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THE AMERICAN COMMONWEALTH

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THE AMERICAN COMMONWEALTH

ABRIDGED EDITION

For the Use of Colleges and High Schools

BEING AN INTRODUCTION TO THE STUDY OF
THE GOVERNMENT AND INSTITUTIONS
OF THE UNITED STATES

BY

JAMES BRYCE

AUTHOR OF "THE HOLY ROMAN EMPIRE," "TRANSCAUCASIA AND ARARAT," ETC.

New York
THE MACMILLAN COMPANY
LONDON: MACMILLAN & CO., LTD.
1905

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Set up and electrotyped October, 1896. Reprinted Januarv. 1897; January, July, 1898; July, 1899; March, July, 1900: January, August, 1902; July, 1903; August, 1904; July, 1905.

Norwood Press
J. S. Cushing & Co. — Berwick & Smith
Norwood Mass. U.S.A.

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PREFACE

This abridged edition of *The American Commonwealth* has been prepared to meet the wishes of a number of teachers in colleges and high schools, who think that parts of the complete work are either too difficult for their pupils, or are at any rate beyond the range of their requirements. I have accordingly omitted from the present volume most of the chapters or paragraphs which do not bear directly upon the Constitution and government of the United States or of the several States of the Union, as well as all the discussions of technical points of law, together with such observations on political questions or the attitude of political parties as seem out of place in a treatise of an educational character. Everything likely to be serviceable for the purposes of instruction has been retained. The corrections made in the last revised edition of the complete work have been inserted, and some others added, in order to bring the statements of fact (so far as possible) up to date.

In the task of selecting the parts to be retained, I have received most valuable assistance from my friend, Mr. Jesse Macy, Professor of Political Science in Iowa College, whose mastery of that subject, and long experience in teaching it, make him a specially competent judge of the comparative educational value, and comparative difficulty to a beginner, of the various parts of the book.

The American Commonwealth was originally written with a view to European rather than to American readers; and the reception it has had the good fortune to find in the United

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States has been to me equally gratifying and unexpected. That reception encourages me to hope that this concise survey of the institutions of their country may prove helpful to young Americans, not only by interesting them in the study of the Constitution as a body of living principles, but also by stimulating in them a thoughtful patriotism, and quickening their sense of the responsibility which will devolve upon them as the citizens of a mighty nation.

September 13th, 1896.

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LIST OF PRESIDENTS

1789–1793	George Washington.
1793–1797	Re-elected.
1797–1801	John Adams.
1801–1805	Thomas Jefferson.
1805–1809	Re-elected.
1809–1813	James Madison.
1813–1817	Re-elected.
1817–1821	James Monroe.
1821–1825	Re-elected.
1825–1829	John Quincy Adams.
1829–1833	Andrew Jackson.
1833–1837	Re-elected.
1837–1841	Martin Van Buren.
1841–1845	William Henry Harrison (died 1841).
	John Tyler.
1845–1849	James Knox Polk.
1849–1853	Zachary Taylor (died 1850).
	Millard Fillmore.
1853–1857	Franklin Pierce.
1857–1861	James Buchanan.
1861–1865	Abraham Lincoln.
1865–1869	Re-elected (died 1865).
	Andrew Johnson.
1869–1873	Ulysses S. Grant.
1873–1877	Re-elected.
1877–1881	Rutherford Birchard Hayes.
1881–1885	James Abram Garfield (died 1881).
	Chester A. Arthur.
1885–1889	(Stephen) Grover Cleveland.
1889–1893	Benjamin Harrison.
1893–	Grover Cleveland.

AREA, POPULATION, AND DATE OF ADMISSION OF THE STATES

THE THIRTEEN ORIGINAL STATES, IN THE ORDER IN WHICH THEY RATIFIED THE CONSTITUTION.

	Ratified the Constitution.	Area in square miles.[1]	Population (1890).
Delaware	1787	2,050	168,493
Pennsylvania	1787	45,215	5,258,014
New Jersey	1787	7,815	1,444,933
Georgia	1788	59,475	1,837,353
Connecticut	1788	4,990	746,258
Massachusetts	1788	8,315	2,238,943
Maryland	1788	12,210	1,042,390
South Carolina	1788	30,570	1,151,149
New Hampshire	1788	9,305	376,530
Virginia	1788	42,450	1,655,980
New York	1788	49,170	5,997,853
North Carolina	1789	52,250	1,617,947
Rhode Island	1790	1,250	345,506

STATES SUBSEQUENTLY ADMITTED, IN THE ORDER OF THEIR ADMISSION.

Vermont	1791	9,565	332,422
Kentucky	1792	40,400	1,858,635
Tennessee	1796	42,050	1,767,518
Ohio	1802	41,060	3,672,316
Louisiana	1812	48,720	1,118,587
Indiana	1816	36,350	2,192,404
Mississippi	1817	46,810	1,289,600
Illinois	1818	56,650	3,826,351
Alabama	1819	52,250	1,513,017

[1] According to census returns of 1890.

	Admitted.	Area in square miles.	Population (1890).
Maine	1820	33,040	661,086
Missouri	1821	69,415	2,679,184
Arkansas	1836	53,850	1,128,179
Michigan	1837	58,915	2,093,889
Florida	1845	58,680	391,422
Texas	1845	265,780	2,235,523
Iowa	1846	56,025	1,911,896
Wisconsin	1848	56,040	1,686,880
California	1850	158,360	1,208,130
Minnesota	1858	83,365	1,301,826
Oregon	1859	96,030	313,767
Kansas	1861	82,080	1,427,096
W. Virginia	1863	24,780	762,794
Nevada	1864	110,700	45,761
Nebraska	1867	77,510	1,058,910
Colorada	1876	103,925	412,198
N. Dakota	1889	70,795	182,719
S. Dakota	1889	77,650	328,808
Montana	1889	146,080	132,159
Washington	1889	69,180	349,390
Wyoming	1890	97,890	60,705
Idaho	1890	84,800	84,385
Utah[1]	1895–6	84,970	207,905

THE TERRITORIES.

	Area.	Population in 1890.
New Mexico	122,580	153,593
Arizona	113,020	59,620
Oklahoma	39,030	61,834

UNORGANIZED TERRITORIES.

	Area.	Population in 1890.
Indian Territory	31,400	179,321
Alaska	531,409	31,795

[1] An act was passed in Congress, in the summer of 1894, entitling Utah to enter, at a future specified date, the States of the Union.

Dates of some Remarkable Events in the History of the North American Colonies and United States

1606	First Charter of Virginia.
1607	First Settlement in Virginia.
1620	First Settlement in Massachusetts.
1664	Taking of New Amsterdam (New York).
1759	Battle of Heights of Abraham and taking of Quebec.
1775	Beginning of the Revolutionary War.
1776	Declaration of Independence.
1781	Formation of the Confederation.
1783	Independence of United States recognized.
1787	Constitutional Convention at Philadelphia.
1788	The Constitution ratified by Nine States.
1789	Beginning of the Federal Government.
1793	Invention of the Cotton Gin.
1803	Purchase of Louisiana from France.
1812–14	War with England.
1812–15	Disappearance of the Federalist Party.
1819	Purchase of Florida from Spain.
1819	Steamers begin to cross the Atlantic.
1820	The Missouri Compromise.
1828–32	Formation of the Whig Party.
1830	First Passenger Railway opened.
1840	National Nominating Conventions regularly established.
1844	First Electric Telegraph in operation.
1845	Admission of Texas to the Union.
1846–48	Mexican War and Cession of California.
1852–56	Fall of the Whig Party
1854–56	Formation of the Republican Party.
1857	Dred Scott decision delivered.
1861–65	War of Secession.
1869	First Trans-Continental Railway completed.
1877	Final withdrawal of Federal troops from the South.
1879	Specie Payments resumed.

PART I

THE NATIONAL GOVERNMENT

CHAPTER I

THE NATION AND THE STATES

A FEW years ago the American Protestant Episcopal Church was occupied at its triennial Convention in revising its liturgy. It was thought desirable to introduce among the short sentence prayers a prayer for the whole people; and an eminent New England divine proposed the words "O Lord, bless our nation." Accepted one afternoon on the spur of the moment, the sentence was brought up next day for reconsideration, when so many objections were raised by the laity to the word "nation," as importing too definite a recognition of national unity, that it was dropped, and instead there were adopted the words "O Lord, bless these United States."

To Europeans who are struck by the patriotism and demonstrative national pride of their transatlantic visitors, this fear of admitting that the American people constitute a nation seems extraordinary. But it is only the expression on its sentimental side of the most striking and pervading characteristic of the political system of the country, the existence of a double government, a double allegiance, a double patriotism. America is a Commonwealth of commonwealths, a Republic of republics, a State which, while one, is nevertheless composed of other States even more essential to its existence than it is to theirs.

This is a point of so much consequence, and so apt to be misapprehended by Europeans, that a few sentences may be given to it.

When within a large political community smaller communities are found existing, the relation of the smaller to the larger usually appears in one or other of the two following forms. One form is that of a League, in which a number of political bodies, be they monarchies or republics, are bound together so as to constitute for certain purposes, and especially for the pur-

pose of common defence, a single body. The members of such a composite body or league are not individual men but communities. It exists only as an aggregate of communities, and will therefore vanish so soon as the communities which compose it separate themselves from one another. Moreover it deals with and acts upon these communities only. With the individual citizen it has nothing to do, no right of taxing him, or judging him, or making laws for him, for in all these matters it is to his own community that the allegiance of the citizen is due. A familiar instance of this form is to be found in the Germanic Confederation as it existed from 1815 till 1866.

In the second form, the smaller communities are mere subdivisions of that greater one which we call the Nation. They have been created, or at any rate they exist, for administrative purposes only. Such powers as they possess are powers delegated by the nation, and can be overridden by its will. The nation acts directly by its own officers, not merely on the communities, but upon every single citizen; and the nation, because it is independent of these communities, would continue to exist were they all to disappear. Examples of such minor communities may be found in the departments of modern France and the counties of modern England.

The American Federal Republic corresponds to neither of these two forms, but may be said to stand between them. Its central or National government is not a mere league, for it does not wholly depend on the component communities which we call the States. It is itself a commonwealth as well as a union of commonwealths, because it claims directly the obedience of every citizen, and acts immediately upon him through its courts and executive officers. Still less are its minor communities, the States, mere subdivisions of the Union, mere creatures of the National government, like the counties of England or the departments of France. They have over their citizens an authority which is their own, and not delegated by the central government. They have not been called into being by that government. They — that is, the older ones among them — existed before it. They could exist without it.

This is the cause of that immense complexity which startles and at first bewilders the student of American institutions, a complexity which makes American history and current Ameri-

can politics difficult to the European, who finds in them phenomena to which his own experience supplies no parallel. There are two loyalties, two patriotisms; and the lesser patriotism, as the incident in the Episcopal Convention shows, is jealous of the greater. There are two governments, covering the same ground, commanding, with equally direct authority, the obedience of the same citizen.

CHAPTER II

THE ORIGIN OF THE CONSTITUTION

When in the reign of George III. troubles arose between England and her North American colonists, there existed along the eastern coast of the Atlantic thirteen little communities, the largest of which (Virginia) had not more than half a million of free people, and the total population of which did not reach three millions. All owned allegiance to the British Crown, all, except Connecticut and Rhode Island, received their governors from the Crown;[1] in all, causes were carried by appeal from the colonial courts to the English Privy Council. Acts of the British Parliament ran there, as they now run in the British colonies, whenever expressed to have that effect, and could over-rule such laws as the colonies might make. But practically each colony was a self-governing commonwealth, left to manage its own affairs with scarcely any interference from home. Each had its legislature, its own statutes adding to or modifying the English Common Law, its local corporate life and traditions, with no small local pride in its own history and institutions, superadded to the pride of forming part of the English race and the great free British realm. Between the various colonies there was no other political connection than that which arose from their all belonging to this race and realm, so that the inhabitants of each enjoyed in every one of the others the rights and privileges of British subjects.

When the oppressive measures of the home government roused the colonies, they naturally sought to organize their resistance in common.[2] Singly they would have been an easy

[1] In Maryland and Pennsylvania, however, the governor was, during the larger part of the colonial period, appointed by the "Proprietor."

[2] There had been a congress of delegates from seven colonies at Albany in 1754 to deliberate on measures relative to the impending war with France, but this, of course, took place with the sanction of the mother country, and was a purely temporary measure.

prey, for it was long doubtful whether even in combination they could make head against regular armies. A congress of delegates from nine colonies held at New York in 1765 was followed by another at Philadelphia in 1774, at which twelve were represented, which called itself Continental (for the name American had not yet become established), and spoke in the name of "the good people of these colonies," the first assertion of a sort of national unity among the English of America. This congress, in which from 1775 onwards all the colonies were represented, was a merely revolutionary body, called into existence by the war with the mother country. But in 1776 it declared the independence of the colonies, and in 1777 it gave itself a new legal character by framing the "Articles of Confederation and Perpetual Union," whereby the thirteen States (as they then called themselves) entered into a "firm league of friendship" with each other, offensive and defensive, while declaring that "each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States in Congress assembled."

This Confederation, which was not ratified by all the States till 1781, was rather a league than a National government, for it possessed no central authority except an assembly in which every State, the largest and the smallest alike, had one vote, and this assembly had no jurisdiction over the individual citizens. There was no Federal executive, no Federal judiciary, no means of raising money except by the contributions of the States, contributions which they were slow to render, no power of compelling the obedience either of States or individuals to the commands of Congress. The plan corresponded to the wishes of the colonists, who did not yet deem themselves a nation, and who in their struggle against the power of the British Crown were resolved to set over themselves no other power, not even one of their own choosing. But it worked badly even while the struggle lasted, and after the immediate danger from England had been removed by the peace of 1783, it worked still worse, and was in fact, as Washington said, no better than anarchy. The States were indifferent to Congress and their common concerns, so indifferent that it was found difficult to procure a quorum of States for weeks or even months after the

day fixed for meeting. Congress was impotent, and commanded respect as little as obedience. Much distress prevailed in the trading States, and the crude attempts which some legislatures made to remedy the depression by emitting inconvertible paper, by constituting other articles than the precious metals legal tender, and by impeding the recovery of debts, aggravated the evil, and in several instances led to seditious outbreaks. The fortunes of the country seemed at a lower ebb than even during the war with England.

Sad experience of their internal difficulties, and of the contempt with which foreign governments treated them, at last produced a feeling that some firmer and closer union was needed. A convention of delegates from five States met at Annapolis in Maryland in 1786 to discuss methods of enabling Congress to regulate commerce, which suffered grievously from the varying and often burdensome regulations imposed by the several States. It drew up a report which condemned the existing state of things, declared that reforms were necessary, and suggested a further general convention in the following year to consider the condition of the Union and the needed amendments in its Constitution. Congress, to which the report had been presented, approved it, and recommended the States to send delegates to a convention, which should "revise the Articles of Confederation, and report to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress and confirmed by the States, render the Federal Constitution adequate to the exigencies of government and the preservation of the Union."

The Convention thus summoned met at Philadelphia on the 14th May, 1787, became competent to proceed to business on May 25th, when seven States were represented, and chose George Washington to preside. Delegates attended from every State but Rhode Island, and among these delegates was to be found from nearly all the best intellect and the ripest political experience the United States then contained. The instructions they had received limited their authority to the revision of the Articles of Confederation and the proposing to Congress and the State legislatures such improvements as were required therein. But with admirable boldness, boldness doubly admirable in Englishmen and lawyers, the majority

ultimately resolved to disregard these restrictions, and to prepare a wholly new Constitution, to be considered and ratified neither by Congress nor by the State legislatures, but by the peoples of the several States.

This famous assembly, which consisted of fifty-five delegates, thirty-nine of whom signed the Constitution which it drafted, sat nearly five months, and expended upon its work an amount of labour and thought commensurate with the magnitude of the task and the splendour of the result. The debates were secret, a proof of the confidence reposed in the members; and it was well that they were secret, for criticism from without might have imperilled a work which seemed repeatedly on the point of breaking down, so great were the difficulties encountered from the divergent sentiments and interests of different parts of the country, as well as of the larger and smaller States.[1]

It is hard to-day, even for Americans, to realize how enormous those difficulties were. The Convention had not only to create *de novo*, on the most slender basis of pre-existing national institutions, a National government for a widely scattered people, but they had in doing so to respect the fears and jealousies and apparently irreconcilable interests of thirteen separate commonwealths, to all of whose governments it was necessary to leave a sphere of action wide enough to satisfy a deep-rooted local sentiment, yet not so wide as to imperil national unity. Well might Hamilton say: "The establishment of a Constitution, in time of profound peace, by the voluntary consent of a whole people, is a prodigy to the completion of which I look forward with trembling anxiety."[2] And well might he quote

[1] Benjamin Franklin, who was one of the delegates from Pennsylvania (being then eighty-one years of age), was so much distressed at the difficulties which arose and the prospect of failure that he proposed that the Convention, as all human means of obtaining agreement seemed to be useless, should open its meetings with prayer. The suggestion, remarkable as coming from one so well known for his sceptical opinions, would have been adopted but for the fear that the outside public might thus learn how grave the position of affairs was. The original of Franklin's proposition, written in his own still clear and firm hand, with his note stating that only three or four agreed with him, is preserved in the State Department at Washington, where may be also seen the draft of the Constitution with the signatures of the thirty-nine delegates.

[2] *Federalist*, No. lxxxv.

the words of David Hume (*Essays;* "The Rise of Arts and Sciences"): "To balance a large State or society, whether monarchical or republican, on general laws, is a work of so great difficulty that no human genius, however comprehensive, is able by the mere dint of reason and reflection to effect it. The judgments of many must unite in the work; experience must guide their labour; time must bring it to perfection; and the feeling of inconveniences must correct the mistakes which they inevitably fall into in their first trials and experiments."

It was even a disputable point whether the colonists were already a nation or only the raw material out of which a nation might be formed.[1] There were elements of unity, there were also elements of diversity. All spoke the same language. All, except a few descendants of Dutchmen and Swedes in New York and Delaware, some Germans in Pennsylvania, some children of French Huguenots in New England and the Middle States, belonged to the same race.[2] All, except some Roman Catholics in Maryland, professed the Protestant religion. All were governed by the same English Common Law, and prized it not only as the bulwark which had sheltered their forefathers from the oppression of the Stuart kings, but as the basis of their more recent claims of right against the encroachments of George III. and his colonial officers. In ideas and habits of life there was less similarity, but all were republicans, managing their affairs by elective legislatures, attached to local self-government, and animated by a common pride in their successful resistance to England, which they then hated with a true family hatred, a hatred to which her contemptuous treatment of them added a sting.

On the other hand their geographical position made communication very difficult. The sea was stormy in winter; the roads were bad; it took as long to travel by land from

[1] Mr. Wilson said in the Pennsylvania Convention of 1787: "By adopting this Constitution we shall become a nation; we are not now one. We shall form a national character; we are now too dependent on others." He proceeds with a remarkable prediction of the influence which American freedom would exert upon the Old World.—Elliot's *Debates*, vol. ii. p. 526.

[2] The Irish, a noticeable element in North Carolina and parts of Pennsylvania, Virginia, and New Hampshire, were not Catholic Celts but Scoto-Irish Presbyterians from Ulster, who, animated by resentment at the wrongs and religious persecution they had suffered at home, had been among the foremost combatants in the Revolutionary War.

Charleston to Boston as to cross the ocean to Europe, nor was the journey less dangerous. The wealth of some States consisted in slaves, of others in shipping; while in others there was a population of small farmers, characteristically attached to old habits. Manufactures had hardly begun to exist. The sentiment of local independence showed itself in intense suspicion of any external authority; and most parts of the country were so thinly peopled that the inhabitants had lived practically without any government, and thought that in creating one they would be forging fetters for themselves. But while these diversities and jealousies made union difficult, two dangers were absent which have beset the framers of constitutions for other nations. There were no reactionary conspirators to be feared, for every one prized liberty and equality. There were no questions between classes, no animosities against rank and wealth, for rank and wealth did not exist.

It was inevitable under such circumstances that the Constitution, while aiming at the establishment of a durable central power, should pay great regard to the existing centrifugal forces. It was and remains what its authors styled it, eminently an instrument of compromises; it is perhaps the most successful instance in history of what a judicious spirit of compromise may effect. Yet out of the point which it was for this reason obliged to leave unsettled there arose fierce controversies, which after two generations, when accumulated irritation and incurable misunderstanding had been added to the force of material interests, burst into flame in the War of Secession.

The draft Constitution was submitted, as its last article provided, to conventions of the several States (*i.e.* bodies specially chosen by the people for the purpose) for ratification. It was to come into effect as soon as nine States had ratified, the effect of which would have been, in case the remaining States, or any of them, had rejected it, to leave such States standing alone in the world, since the old Confederation was of course superseded and annihilated. Fortunately all the States did eventually ratify the new Constitution, but two of the most important, Virginia and New York,[1] did not do so till the

[1] Virginia was then much the largest State (population in 1790, 747,610). New York was reckoned among the smaller States (population 340,120) but her central geographical position made her adhesion extremely important.

middle of 1788, after nine others had already accepted it; and two, North Carolina and Rhode Island, at first refused, and only consented to enter the new Union more than a year later, when the government it had created had already come into operation.

There was a struggle everywhere over the adoption of the Constitution, a struggle presaging the birth of the two great parties that for many years divided the American people. The chief source of hostility was the belief that a strong central government endangered both the rights of the States and the liberties of the individual citizen. Freedom, it was declared, would perish, freedom rescued from George III. would perish at the hands of her own children. Consolidation (for the word centralization had not yet been invented) would extinguish the State governments and the local institutions they protected. The feeling was very bitter, and in some States, notably in Massachusetts and New York, the majorities were dangerously narrow. Had the decision been left to what is now called "the voice of the people," that is, to the mass of the citizens all over the country, voting at the polls, the voice of the people would probably have pronounced against the Constitution, and this would have been still more likely if the question had been voted on everywhere upon the same day, seeing that several doubtful States were influenced by the approval which other States had already given. But the modern method of taking the popular judgment had not been invented. The question was referred to conventions in the several States. The Conventions were composed of able men, who listened to thoughtful arguments, and were themselves influenced by the authority of their leaders. The counsels of the wise prevailed over the prepossessions of the multitude. Yet these counsels would hardly have prevailed but for a cause which is apt to be now overlooked. This was the dread of foreign powers.[1] The United States had at that time two European monarchies, Spain and England, as its

[1] The other chief cause was the economic distress and injury to trade consequent on the disorganized condition of several States. See the observations of Mr. Wilson in the Pennsylvania Convention (Elliot's *Debates*, ii. 524). He shows that the case was one of necessity, and winds up with the remark, "The argument of necessity is the patriot's defence as well as the tyrant's plea."

neighbours on the American continent. France had lately held territories to the north of them in Canada, and to the south and west of them in Louisiana.[1] She had been their ally against England, she became in a few years again the owner of territories west of the Mississippi. The fear of foreign interference, the sense of weakness, both at sea and on land, against the military monarchies of Europe, was constantly before the mind of American statesmen, and made them anxious to secure at all hazards a National government capable of raising an army and navy, and of speaking with authority on behalf of the new republic. It is remarkable that the danger of European aggression or complications was far more felt in the United States from 1783 down till about 1820, than it has been during the last half century when steam has brought Europe five times nearer than it then was.

Several of the conventions which ratified the Constitution accompanied their acceptance with an earnest recommendation of various amendments to it, amendments designed to meet the fears of those who thought that it encroached too far upon the liberties of the people. Some of these were adopted, immediately after the original instrument had come into force, by the method it prescribes, viz. a two-thirds majority in Congress and a majority in three-fourths of the States. They are the amendments of 1791, ten in number, and they constitute what the Americans, following a venerable English precedent, call a Bill or Declaration of Rights.

The Constitution of 1789 deserves the veneration with which the Americans have been accustomed to regard it. It is true that many criticisms have been passed upon its arrangement, upon its omissions, upon the artificial character of some of the institutions it creates. Recognizing slavery as an institution existing in some States, and not expressly negativing the right of a State to withdraw from the Union, it has been charged with having contained the germ of civil war, though that germ took seventy years to come to maturity. And whatever success it has attained must be in large measure ascribed

[1] The vast territory then called Louisiana was transferred by France to Spain in 1762, but Spanish government was not established there till 1789. It was ceded by Spain to France in 1800, and purchased by the United States from Napoleon in 1803. Spain had originally held Florida, ceded it to Britain in 1763, received it back in 1783, and in 1819 sold it to the United States.

to the political genius, ripened by long experience, of the Anglo-American race, by whom it has been worked, and who might have managed to work even a worse-drawn instrument. Yet, after all deductions, it ranks above every other written constitution for the intrinsic excellence of its scheme, its adaptation to the circumstances of the people, the simplicity, brevity, and precision of its language, its judicious mixture of definiteness in principle with elasticity in details. One is therefore induced to ask, before proceeding to examine it, to what causes, over and above the capacity of its authors, and the patient toil they bestowed upon it, these merits are due, or in other words, what were the materials at the command of the Philadelphia Convention for the achievement of so great an enterprise as the creation of a nation by means of an instrument of government. The American Constitution is no exception to the rule that everything which has power to win the obedience and respect of men must have its roots deep in the past, and that the more slowly every institution has grown, so much the more enduring is it likely to prove. There is little in this Constitution that is absolutely new. There is much that is as old as Magna Charta.

The men of the Convention had the experience of the English Constitution. That Constitution, very different then from what it is now, was even then not quite what they thought it. Their view was tinged not only by recollections of the influence exercised by King George the Third, an influence due to transitory causes, but which made them overrate its monarchical element,[1] but also by the presentation of it which they found in the work of Mr. Justice Blackstone. He, as was natural in a lawyer and a man of letters, described rather its theory than its practice, and its theory was many years behind its practice. The powers and functions of the Cabinet, the overmastering force of the House of Commons, the intimate connection between legislation and administration, these which are to us now the main characteristics of the English Constitution were still far from fully developed. But in other points

[1] There is a tendency in colonists to over-estimate the importance of the Crown, whose conspicuous position as the authority common to the whole empire makes it an object of special interest and respect to persons living at a distance. It touches their imagination, whereas assemblies excite their criticism.

of fundamental importance they appreciated and turned to excellent account its spirit and methods.

Further, they had the experience of their colonial and State governments, and especially, for this was freshest and most in point, the experience of the working of the State Constitutions, framed at or since the date when the colonies threw off their English allegiance. Many of the Philadelphia delegates had joined in preparing these instruments: all had been able to watch and test their operation. They compared notes as to the merits, tested by practice, of the devices which their States had respectively adopted. They had the inestimable advantage of knowing written or rigid constitutions in the concrete; that is to say, of comprehending how a system of government actually moves and plays under the control of a mass of statutory provisions defining and limiting the powers of its several organs. The so-called Constitution of England consists largely of customs, precedents, traditions, understandings, often vague and always flexible. It was quite a different thing, and for the purpose of making a constitution for the American nation an even more important thing, to have lived under and learnt to work systems determined by the hard and fast lines of a single document having the full force of law, for this experience taught them how much might safely be included in such a document, and how far room must be left under it for unpredictable emergencies and unavoidable development.

Lastly, they had, in the principle of the English Common Law that an act done by any official person or law-making body beyond his or its legal competence is simply void, a key to the difficulties involved in the establishment of a variety of authorities not subordinate to one another, but each supreme in its own defined sphere. The application of this principle made it possible not only to create a National government which should leave free scope for the working of the State governments, but also so to divide the powers of the National government among various persons and bodies as that none should absorb or overbear the others. By what machinery these objects were attained will appear when we come to consider the effect of a written or rigid constitution embodying a fundamental law, and the functions of the judiciary in expounding and applying such a law.

CHAPTER III

NATURE OF THE FEDERAL GOVERNMENT

The acceptance of the Constitution of 1789 made the American people a nation. It turned what had been a League of States into a Federal State, by giving it a National government with a direct authority over all citizens. But as this National government was not to supersede the governments of the States, the problem which the constitution-makers had to solve was two-fold. They had to create a central government. They had also to determine the relations of this central government to the States as well as to the individual citizen. An exposition of the Constitution and criticism of its working must therefore deal with it in these two aspects, as a system of National government built up of executive powers and legislative bodies, like the monarchy of England or the republic of France, and as a Federal system linking together and regulating the relations of a number of commonwealths which are for certain purposes, but for certain purposes only, subordinated to it. It will conduce to clearness if these two aspects are kept distinct; and the most convenient course will be to begin with the former, and first to describe the American system as a National system, leaving its Federal character for the moment on one side.

It must, however, be remembered that the Constitution does not profess to be a complete scheme of government, creating organs for the discharge of all the functions and duties which a civilized community undertakes. It presupposes the State governments. It assumes their existence, their wide and constant activity. It is a scheme designed to provide for the discharge of such and so many functions of government as the States did not, and indeed could not, or at any rate could not adequately, possess and discharge. It is therefore, so to speak, the complement and crown of the State Constitutions, which

must be read along with it and into it in order to make it cover the whole field of civil government, as do the Constitutions of such countries as France, Belgium, Italy.

The administrative, legislative, and judicial functions for which the Federal Constitution provides are those relating to matters which must be deemed common to the whole nation, either because all the parts of the nation are alike interested in them, or because it is only by the nation as a whole that they can be satisfactorily undertaken. The chief of these common or national matters are [1] —

War and peace: treaties and foreign relations generally.
Army and navy.
Federal courts of justice.
Commerce, foreign and domestic.
Currency.
Copyright and patents.
The post-office and post roads.
Taxation for the foregoing purposes, and for the general support of the government.
The protection of citizens against unjust or discriminating legislation by any State.[2]

This list includes the subjects upon which the National legislature has the right to legislate, the National executive to enforce the Federal laws and generally to act in defence of national interests, the National judiciary to adjudicate. All other legislation and administration is left to the several States, without power of interference by the Federal legislature or Federal executive.

Such then being the sphere of the National government, let us see in what manner it is constituted, of what departments it consists.

The framers of this government set before themselves four objects as essential to its excellence, viz. —

Its vigour and efficiency.
The independence of each of its departments (as being essential to the permanency of its form).

[1] The full list will be found in the Constitution, Art. i. § 8 (printed in the Appendix).

[2] Amendments xiv. and xv.

Its dependence on the people.
The security under it of the freedom of the individual.

The first of these objects they sought by creating a strong executive, the second by separating the legislative, executive, and judicial powers from one another, and by the contrivance of various checks and balances, the third by making all authorities elective and elections frequent, the fourth both by the checks and balances aforesaid, so arranged as to restrain any one department from tyranny, and by placing certain rights of the citizen under the protection of the written Constitution.

They had neither the rashness nor the capacity necessary for constructing a Constitution *a priori*. There is wonderfully little genuine inventiveness in the world, and perhaps least of all has been shown in the sphere of political institutions. These men, practical politicians who knew how infinitely difficult a business government is, desired no bold experiments. They preferred, so far as circumstances permitted, to walk in the old paths, to follow methods which experience had tested.[1] Accordingly they started from the system on which their own colonial governments, and afterwards their State governments, had been conducted. This system bore a general resemblance to the British Constitution; and in so far it may with truth be said that the British Constitution became a model for the new National government. They held England to be the freest and best-governed country in the world, but were resolved to avoid the weak points which had enabled King George III. to play the tyrant, and which rendered English liberty, as they thought, far inferior to that which the Constitutions of their own States secured. With this venerable mother, and these children, better in their judgment than the mother, before their eyes, they created an executive magistrate, the President, on the model of the State governor, and of the British Crown. They created a legislature of the two Houses, Congress, on the model of the

[1] Mr. Lowell has said with equal point and truth of the men of the Convention: "They had a profound disbelief in theory and knew better than to commit the folly of breaking with the past. They were not seduced by the French fallacy that a new system of government could be ordered like a new suit of clothes. They would as soon have thought of ordering a suit of flesh and skin. It is only on the roaring loom of time that the stuff is woven for such a vesture of their thought and experience as they were meditating." — Address on Democracy, delivered Oct. 6, 1884.

two Houses of their State legislatures, and of the British Parliament. And following the precedent of the British judges irremovable except by the Crown and Parliament combined, they created a judiciary appointed for life, and irremovable save by impeachment.[1]

In these great matters, however, as well as in many lesser matters, they copied not so much the Constitution of England as the Constitutions of their several States, in which, as was natural, many features of the English Constitution had been embodied. It has been truly said that nearly every provision of the Federal Constitution that has worked well is one borrowed from or suggested by some State Constitution; nearly every provision that has worked badly is one which the Convention, for want of a precedent, was obliged to devise for itself. To insist on this is not to detract from the glory of that illustrious body, for if we are to credit them with less inventiveness than has sometimes been claimed for them, we must also credit them with a double portion of the wisdom which prefers experience to *a priori* theory, and the sagacity which selects the best materials from a mass placed before it, aptly combining them to form a new structure.

Of minor divergences between their work and the British Constitution I shall speak subsequently. But one profound difference must be noted here. The British Parliament had always been, was then, and remains now, a sovereign and constituent assembly. It can make and unmake any and every law, change the form of government or the succession to the crown, interfere with the course of justice, extinguish the most sacred private rights of the citizen. Between it and the people at large there is no legal distinction, because the whole plenitude of the people's rights and powers resides in it, just as if the whole nation were present within the chamber where it sits. In point of legal theory it is the nation, being the historical successor of the Folk-Moot of our Teutonic forefathers. Both practically and legally, it is to-day the only and the sufficient depository of the authority of the nation;

[1] Minor differences between the English and American systems are that the American Federal judge is appointed by the President, "with the advice and consent of the Senate," an English judge by the Crown alone: an American judge is impeachable by the House of Representatives, and tried by the Senate, an English judge is removable by the Crown on an address by both Houses.

and is therefore, within the sphere of law, irresponsible and omnipotent.

In the American system there exists no such body. Not merely Congress alone, but also Congress and the President conjoined, are subject to the Constitution, and cannot move a step outside the circle which the Constitution has drawn around them. If they do, they transgress the law and exceed their powers. Such acts as they may do in excess of their powers are void, and may be, indeed ought to be, treated as void by the meanest citizen. The only power which is ultimately sovereign, as the British Parliament is always and directly sovereign, is the people of the States, acting in the manner prescribed by the Constitution, and capable in that manner of passing any law whatever in the form of a constitutional amendment.

This fundamental divergence from the British system is commonly said to have been forced upon the men of 1787 by the necessity, in order to safeguard the rights of the several States, of limiting the competence of the National government. But even supposing there had been no States to be protected, the jealousy which the American people felt of those whom they chose to govern them, their fear lest one power in the government should absorb the rest, their anxiety to secure the primordial rights of the citizens from attack either by magistrate or by legislature, would doubtless have led, as happened with the earlier constitutions of revolutionary France, to the creation of a supreme constitution or fundamental instrument of government, placed above and controlling the National legislature itself. They had already such fundamental instrument in the charters of the colonies, which had passed into the Constitutions of the several States; and they would certainly have followed, in creating their National Constitution, a precedent which they deemed so precious.

The subjection of all the ordinary authorities and organs of government to a supreme instrument expressing the will of the sovereign people, and capable of being altered by them only, has been usually deemed the most remarkable novelty of the American system. But it is merely an application, to the wider sphere of the nation, of a plan approved by the experience of the several States. And the plan had, in these States,

been the outcome rather of a slow course of historical development than of conscious determination taken at any one point of their progress from petty settlements to powerful republics. Nevertheless, it may well be that the minds of the leaders who guided this development were to some extent influenced and inspired by recollections of the English Commonwealth of the seventeenth century, which had seen the establishment, though for a brief space only, of a genuine supreme or rigid Constitution, in the form of the famous Instrument of Government of A.D. 1653, and some of whose sages had listened to the discourses in which James Harrington, one of the most prescient minds of that great age, showed the necessity for such a constitution, and laid down its principles, suggesting that, in order to give it the higher authority, it should be subscribed by the people themselves.

We may now proceed to consider the several departments of the National government. It will be simplest to treat of each separately, and then to examine the relations of each to the others, reserving for subsequent chapters an account of the relations of the National government as a whole to the several States.

CHAPTER IV

THE PRESIDENT

Every one who undertakes to describe the American system of government is obliged to follow the American division of it into the three departments — Executive, Legislative, Judicial. I begin with the executive, as the simplest of the three.

The President is the creation of the Constitution of 1789. Under the Confederation there was only a presiding officer of Congress, but no head of the nation.

Why was it thought necessary to have a President at all? The fear of monarchy, of a strong government, of a centralized government, prevailed widely in 1787. George III. was an object of hatred: he remained a bogey to succeeding generations of American children. The Convention found it extremely hard to devise a satisfactory method of choosing the President, nor has the method they adopted proved satisfactory. That a single head is not necessary to a republic might have been suggested to the Americans by those ancient examples to which they loved to recur. The experience of modern Switzerland has made it still more obvious to us now. Yet it was settled very early in the debates of 1787 that the central executive authority must be vested in one person; and the opponents of the draft Constitution, while quarrelling with his powers, did not accuse his existence.

The explanation is to be found not so much in a wish to reproduce the British Constitution as in the familiarity of the Americans, as citizens of the several States, with the office of State governor (in some States then called President) and in their disgust with the feebleness which Congress had shown under the Confederation in its conduct of the war, and, after peace was concluded, of the general business of the country. Opinion called for a man, because an assembly had been found

to lack promptitude and vigour. And it may be conjectured that the alarms felt as to the danger from one man's predominance were largely allayed by the presence of George Washington. Even while the debates were proceeding, every one must have thought of him as the proper person to preside over the Union as he was then presiding over the Convention. The creation of the office would seem justified by the existence of a person exactly fitted to fill it, one whose established influence and ripe judgment would repair the faults then supposed to be characteristic of democracy, its impulsiveness, its want of respect for authority, its incapacity for pursuing a consistent line of action.

Hamilton felt so strongly the need for having a vigorous executive who could maintain a continuous policy, as to suggest that the head of the state should be appointed for good behaviour, *i.e.* for life, subject to removal by impeachment. The idea was disapproved, though it received the support of persons so democratically-minded as Madison and Edmund Randolph; but nearly all sensible men, including many who thought better of democracy than Hamilton himself did, admitted that the risks of foreign war, risks infinitely more serious in the infancy of the Republic than they have subsequently proved, required the concentration of executive powers into a single hand. And the fact that in every one of their commonwealths there existed an officer in whom the State Constitution vested executive authority, balancing him against the State legislature, made the establishment of a Federal chief magistrate seem the obvious course.

Assuming that there was to be such a magistrate, the statesmen of the Convention, like the solid practical men they were, did not try to construct him out of their own brains, but looked to some existing models. They therefore made an enlarged copy of the State governor, or to put the same thing differently, a reduced and improved copy of the English king. He is George III. shorn of a part of his prerogative by the intervention of the Senate in treaties and appointments, of another part by the restriction of his action to Federal affairs, while his dignity as well as his influence are diminished by his holding office for four years, instead of for life.[1] His salary is too

[1] When the Romans got rid of their king, they did not really extinguish the office, but set up in their consul a sort of annual king, limited not only by the

small to permit him either to maintain a Court or to corrupt the legislature; nor can he seduce the virtue of the citizens by the gift of titles of nobility, for such titles are altogether forbidden. Subject to these precautions, he was meant by the constitution-framers to resemble the State governor and the British king, not only in being the head of the executive, but in standing apart from and above political parties. He was to represent the nation as a whole, as the governor represented the State commonwealth. The independence of his position, with nothing either to gain or to fear from Congress, would, it was hoped, set him free to think only of the welfare of the people.

This idea appears in the method provided for the election of a President. To have left the choice of the chief magistrate to a direct popular vote over the whole country would have raised a dangerous excitement, and would have given too much encouragement to candidates of merely popular gifts. To have entrusted it to Congress would have not only subjected the executive to the legislature in violation of the principle which requires these departments to be kept distinct, but have tended to make him the creature of one particular faction instead of the choice of the nation. Hence the device of a double election was adopted. The Constitution directs each State to choose a number of presidential electors equal to the number of its representatives in both Houses of Congress. Some weeks later, these electors meet in each State on a day fixed by law, and give their votes in writing for the President and Vice-President.[1] The votes are transmitted, sealed up, to the capital and there opened by the president of the Senate in the presence of both Houses and counted. To preserve the

short duration of his power, but also by the existence of another consul with equal powers. So the Americans hoped to restrain their President not merely by the shortness of his term, but also by diminishing the power which they left to him; and this they did by setting up another authority to which they entrusted certain executive functions, making its consent necessary to the validity of certain classes of the President's executive acts. This is the Senate; whereof more anon.

[1] Originally the person who received most votes was deemed to have been chosen President, and the person who stood second, Vice-President. This led to confusion, and was accordingly altered by the twelfth constitutional amendment, adopted in 1804, which provides that the President and Vice-President shall be voted for separately.

electors from the influence of faction, it is provided that they shall not be members of Congress, nor holders of any Federal office. This plan was expected to secure the choice by the best citizens of each State, in a tranquil and deliberate way, of the man whom they in their unfettered discretion should deem fittest to be chief magistrate of the Union. Being themselves chosen electors on account of their personal merits, they would be better qualified than the masses to select an able and honourable man for President. Moreover, as the votes are counted promiscuously, and not by States, each elector's voice would have its weight. He might be in a minority in his own State, but his vote would nevertheless tell because it would be added to those given by electors in other States for the same candidate.

No part of their scheme seems to have been regarded by the constitution-makers of 1787 with more complacency than this,[1] although no part had caused them so much perplexity. No part has so utterly belied their expectations. The presidential electors have become a mere cog-wheel in the machine; a mere contrivance for giving effect to the decision of the people. Their personal qualifications are a matter of indifference. They have no discretion, but are chosen under a pledge — a pledge of honour merely, but a pledge which has never (since 1796) been violated — to vote for a particular candidate. In choosing them the people virtually choose the President, and thus the very thing which the men of 1787 sought to prevent has happened, — the President is chosen by a popular vote. Let us see how this has come to pass.

In the first two presidential elections (in 1789 and 1792) the independence of the electors did not come into question, because everybody was for Washington, and parties had not yet been fully developed. Yet in the election of 1792 it was generally understood that electors of one way of thinking were to vote for Clinton as their second candidate (*i.e.* for Vice-President) and those of the other side for John Adams. In the third

[1] "The mode of appointment of the chief magistrate of the United States is almost the only part of the system which has escaped without some censure, or which has received the slightest mark of approbation from its opponents." — *Federalist*, No. lxvii., cf. No. 1; and see the observations of Mr. Wilson in the Convention of Pennsylvania; Elliot's *Debates*, vol. ii.

election (1796) no pledges were exacted from electors, but the election contest in which they were chosen was conducted on party lines, and although, when the voting by the electors arrived, some few votes were scattered among other persons, there were practically only two presidential candidates before the country, John Adams and Thomas Jefferson, for the former of whom the electors of the Federalist party, for the latter those of the Republican (Democratic)[1] party were expected to vote.

The fourth election was a regular party struggle, carried on in obedience to party arrangements. Both Federalists and Republicans put the names of their candidates for President and Vice-President before the country, and round these names the battle raged. The notion of leaving any freedom or discretion to the electors had vanished, for it was felt that an issue so great must and could be decided by the nation alone. From that day till now there has never been any question of reviving the true and original intent of the plan of double election. Even in 1876 the suggestion that the disputed election might be settled by leaving the electors free to choose, found no favour. Hence nothing has ever turned on the personality of the electors. They are now so little significant that to enable the voter to know for which set of electors his party desires him to vote, it is customary to put the name of the presidential candidate whose interest they represent at the top of the voting ticket on which their own names are printed. Nor need this extinction of the discretion of the electors be regretted, because what has happened in somewhat similar cases makes it certain that the electors would have so completely fallen under the control of the party organizations as to vote simply at the bidding of the party managers. Popular election is therefore, whatever may be its defects, a healthier method, for it enables the people to reject candidates whom the low morality of party managers would approve.

The completeness and permanence of this change has been assured by the method which now prevails of choosing the electors. The Constitution leaves the method to each State,

[1] The party then called the Republican has for the last sixty years or so been called Democratic. The party now called Republican did not arise till 1854.

and in the earlier days many States entrusted the choice to their legislatures. But as democratic principles became developed, the practice of choosing the electors by direct popular vote, originally adopted by Virginia, Pennsylvania, and Maryland, spread by degrees through the other States, till by 1832 South Carolina was the only State which retained the method of appointment by the legislature. She dropped it in 1868, and popular election now rules everywhere, though any State may go back to the old plan if it pleases.[1] In some States the electors were for a time chosen by districts, like members of the House of Representatives. But the plan of choice by a single popular vote over the whole of the State found increasing favour, seeing that it was in the interest of the party for the time being dominant in the State. In 1828 Maryland was the only State which clung to district voting. She, too, adopted the "general ticket" system in 1832, since which year it was universal until 1891, when Michigan reverted to the district system, the then dominant party in her legislature conceiving that they would thereby secure some districts, and therefore some electors of their own colour, although they could not carry the State as a whole.[2] (This in fact happened in 1892.) Thus the issue comes directly before the people. The parties nominate their respective candidates, as hereafter described, a tremendous "campaign" of stump speaking, newspaper writing, street parades, and torchlight processions sets in and rages for about four months: the polling for electors takes place early in November, on the same day over the whole Union, and when the result is known the contest is over, because the subsequent meeting and voting of the electors in their several States is mere matter of form.

So far the method of choice by electors may seem to be merely a roundabout way of getting the judgment of the people. It is more than this. It has several singular consequences, unforeseen by the framers of the Constitution. It has made the election virtually an election by States, for the

[1] Colorado, not having time, after her admission to the Union in 1876, to provide by law for a popular choice of electors to vote in the election of a President in the November of that year, left the choice to the legislature, but now elects its presidential electors by popular vote like the other States.

[2] Michigan repealed this law in 1893, and now elects by "general ticket."

system of choosing electors by "general ticket" over the whole State usually causes the whole weight of a State to be thrown into the scale of one candidate, that candidate whose list of electors is carried in the given State.[1] In the election of 1884, New York State had thirty-six electoral votes. Each party ran its list or "ticket" of thirty-six presidential electors for the State, who were bound to vote for the party's candidate, Mr. Blaine or Mr. Cleveland. The Democratic list was carried by a majority of 1100 out of a total poll exceeding 1,100,000. Thus, all the thirty-six electoral votes of New York were secured for Mr. Cleveland, and these thirty-six determined the issue of the struggle over the whole Union, in which nearly 10,000,000 popular votes were cast. The hundreds of thousands of votes given in New York for the Blaine or Republican list did not go to swell the support which Mr. Blaine obtained in other States, but were utterly lost. Hence in a presidential election the struggle concentrates itself in the doubtful States, where the great parties are pretty equally divided, and is languid in States where a distinct majority either way may be anticipated, because, since it makes no difference whether a minority be large or small, it is not worth while to struggle hard to increase a minority which cannot be turned into a majority. And hence also a man may be, and has been,[2] elected President by a minority of popular votes.

When such has been the fate of the plan of 1787, it need hardly be said that the ideal President, the great and good man above and outside party, whom the judicious and impartial electors were to choose, has not been secured. The

[1] A list is usually carried entire if carried at all, because it would be foolish for the partisans of a candidate to vote for some only and not for all of the electors whose only function is to vote for him. However, the electors on a ticket seldom receive exactly the same number of popular votes; and thus it sometimes happens that when the election is close, one or two electors of the beaten party find their way in. In California in 1880 one out of the six electors in the Democratic ticket, being personally unpopular, failed to be carried, though the other five were. Similarly in California, Ohio, and Oregon in 1892 one elector belonging to the defeated list was chosen, and in North Dakota was presented the surprising spectacle of the Republican, Democratic, and "Populist" parties each winning one elector.

[2] This happened in 1876, when Mr. Hayes received, on the showing of his own partisans, 252,000 popular votes less than those given for Mr. Tilden; and in 1888, when Mr. Harrison was 95,534 popular votes behind Mr. Cleveland.

ideal was realized once and once only in the person of George Washington. His successor in the chair (John Adams) was a leader of one of the two great parties then formed, the other of which has, with some changes, lasted down to our own time. Jefferson, who came next, was the chief of that other party, and his election marked its triumph. Nearly every subsequent President has been elected as a party leader by a party vote, and has felt bound to carry out the policy of the men who put him in power.[1] Thus instead of getting an Olympian President raised above faction, America has, despite herself, reproduced the English system of executive government by a party majority, reproduced it in a more extreme form, because in England the titular head of the State, in whose name administrative acts are done, stands in isolated dignity outside party politics. The disadvantages of the American plan are patent; but in practice they are less serious than might be expected, for the responsibility of a great office and the feeling that he represents the whole nation tend to sober and control the President. Except as regards patronage, he has seldom acted as a mere tool of faction, or sought to abuse his administrative powers to the injury of his political adversaries.

The Constitution prescribes no limit for the re-eligibility of the President. He may go on being chosen for one four-year period after another for the term of his natural life. But tradition has supplied the place of law. Elected in 1789, Washington submitted to be re-elected in 1792. But when he had served this second term he absolutely refused to serve a third, urging the risk to republican institutions of suffering the same man to continue constantly in office. Jefferson, Madison, Monroe, and Jackson obeyed the precedent, and did not seek, nor their friends for them, re-election after two terms. After them no President was re-elected, except Lincoln, down to General Grant. Grant was President from 1869 to 1873, and again from 1873 to 1877, then came Mr. Hayes; and in 1880 an attempt was made to break the unwritten rule in Grant's

[1] James Monroe was chosen President in 1820 with practical unanimity; but this was because one of the two parties had for the time been crushed out and started no candidate. So also J. Q. Adams, Monroe's successor, can hardly be called a party leader. After him the party-chosen Presidents go on without interruption.

favour. Each party nominates its candidates in a gigantic party assembly called the National Convention. In the Republican party Convention of 1880 a powerful group of the delegates put forward Grant for nomination as the party candidate, alleging his special services as a ground for giving him the honour of a third term. Had there not been among the Republicans themselves a section personally hostile to Grant, or rather to those who surrounded him, the attempt might have succeeded, though it would probably have involved defeat at the polls. But this hostile section found the prepossession of the people against a third term so strong that, by appealing to the established tradition, they defeated the Grant men in the Convention, and obtained the nomination of Mr. Garfield, who was victorious at the ensuing election. This precedent had been taken as practically decisive for the future, because General Grant, though his administration had been marked by grave faults, was an exceptionally popular figure.

The Constitution (Amendment xii., which in this point repeats the original Art. xi. § 1) requires for the choice of a President "a majority of the whole number of electors appointed." If no such majority is obtained by any candidate, *i.e.* if the votes of the electors are so scattered among different candidates, that out of the total number (which in 1888 was 401, and is now under the Apportionment Act of 1891, 444) no one receives an absolute majority (*i.e.* at least 223 votes), the choice goes over to the House of Representatives, who are empowered to choose a President from among the three candidates who have received the largest number of electoral votes. In the House the vote is taken by States, a majority of all the States (*i.e.* at present of twenty-three States out of forty-five) being necessary for a choice. As all the members of the House from a State have but one collective vote, it follows that if they are equally divided among themselves, the vote of that State is lost. Supposing this to be the case in half the total number of States, or supposing the States so to scatter their votes that no candidate receives an absolute majority, then no President is chosen, and the Vice-President becomes President.

Only twice has the election gone to the House. In 1800, when the rule still prevailed that the candidate with the

largest number of votes became President, and the candidate who came second Vice-President, Jefferson and Aaron Burr received the same number. The Jeffersonian electors meant to make him President, but as they had also voted for Burr, there was a tie. After a long struggle the House chose Jefferson. Feeling ran high, and had Jefferson been kept out by the votes of the Federalist party, who hated him more than Burr, his partisans might possibly have taken up arms.[1] In 1824 Andrew Jackson had 99 electoral votes, and his three competitors (J. Q. Adams, Crawford, and Clay) 162 votes between them. The House chose J. Q. Adams by a vote of thirteen States against seven for Jackson and four for Crawford.[2] In this mode of choice, the popular will may be still less recognized than it is by the method of voting through presidential electors, for if the twenty-three smaller States were through their representatives in the House to vote for candidate A, and the twenty-one larger States for candidate B, A would be seated, though the population of the former set of States is, of course, very much below that of the latter.

The Constitution seems, though its language is not explicit, to have intended to leave the counting of the votes to the president of the Senate (the Vice-President of the United States); and in early days this officer superintended the count, and decided questions as to the admissibility of doubtful votes. However, Congress has in virtue of its right to be present at the counting assumed the further right of determining all questions which arise regarding the validity of electoral votes, and has, it need hardly be said, determined them on each occasion from party motives. This would be all very well were a decision by Congress always certain of attainment. But it often happens that one party has a majority in the Senate, another party in the House, and then, as

[1] The votes of two States were for a long time divided; but Hamilton's influence at last induced the Federalist members to abstain from voting against Jefferson, whom he thought less dangerous than Burr. His action — highly patriotic, for Jefferson was his bitter enemy — cost him his life at Burr's hands.

[2] Clay, unlucky throughout in his ambitions for the presidency, had stood fourth in the electoral vote, and so could not be chosen by the House. Jackson had received the largest popular vote in those States where electors were chosen by the people.

the two Houses vote separately and each differently from the other, a deadlock results. I must pass by the minute and often tedious controversies which have arisen on these matters. But one case deserves special mention, for it illustrates an ingrained and formidable weakness of the present electoral system.

In 1876, Mr. Hayes was the Republican candidate for the presidency, Mr. Tilden the Democratic. The former carried his list of electors in seventeen States, whose aggregate electors numbered 163, and the latter carried his list also in seventeen States, whose aggregate electors numbered 184. (As the total number of electors was then 369, 184 was within one of being a half of that number.) Four States remained out of the total thirty-eight, and in each of these four two sets of persons had been chosen by popular vote, each set claiming, on grounds too complicated to be here explained, to be the duly chosen electors from those States respectively.[1] The electoral votes of these four States amounted to twenty-two, so that if in any one of them the Democratic set of electors had been found to have been duly chosen, the Democrats would have secured a majority of electoral votes, whereas even if in all of them Republican electors had been chosen, the Republican electors would have had a majority of one only. In such circumstances the only course for the Republican leaders, as good party men, was to claim all these doubtful States. This they promptly did, — party loyalty is the last virtue that deserts politicians, — and the Democrats did the like.

Meanwhile the electors met and voted in their respective States. In the four disputed States the two sets of electors met, voted, and sent up to Washington, from each of these four, double returns of the electoral votes. The result of the election evidently depended on the question which set of returns should be admitted as being the true and legal returns from the four States respectively. The excitement over the whole Union was intense, and the prospect of a peaceful set-

[1] In Oregon the question was whether one of the chosen electors was disqualified because he was a postmaster. In Florida there were complaints of fraud, in South Carolina of intimidation, in Louisiana two rival State governments existed, each claiming the right to certify electoral returns. There had doubtless been a good deal of fraud and some violence in several of the Southern States.

tlement remote, for the Constitution appeared to provide no means of determining the legal questions involved. Congress, as remarked above, had in some previous instances assumed jurisdiction, but seeing that the Republicans had a majority in the Senate, and the Democrats in the House of Representatives, it was clear that the majority in one House would vote for admitting the Republican returns, the majority in the other for admitting the Democratic. Negotiations between the leaders at last arranged a method of escape. A statute was passed creating an electoral commission of five Senators, five members of the House of Representatives, and five Justices of the Supreme Court, who were to determine all questions as to the admissibility of electoral votes from States sending up double returns.[1] Everything now turned on the composition of the electoral Commission, a body such as had never before been created. The Senate appointed three Republicans and two Democrats. The House of Representatives appointed three Democrats and two Republicans. So far there was an exact balance. The statute had indicated four of the Justices who were to sit, two Republicans and two Democrats, and had left these four to choose a fifth. This fifth was the odd man whose casting vote would turn the scale. The four Justices chose a Republican Justice, and this choice practically settled the result, for every vote given by the members of the Commission was a strict party vote.[2]

The legal questions were so difficult, and for the most part so novel, that it was possible for a sound lawyer and honest man to take in each case either the view for which the Republicans or that for which the Democrats contended. Still it is interesting to observe that the legal judgment of every commissioner happened to coincide with his party proclivities. All the points in dispute were settled by a vote of eight to seven in favour of the returns transmitted by the Republican electors

[1] Power was reserved to Congress to set aside by a vote of both Houses the decisions of the Commission, but as the two Houses differed in every case, the Democrats of the House always voting against each determination of the Commission, and the Republicans of the Senate supporting it, this provision made no difference.

[2] The Commission decided unanimously that the Democratic set of electors from South Carolina were not duly chosen, but they divided eight to seven as usual on the question of recognizing the Republican electors of that State.

in the four disputed States, and Mr. Hayes was accordingly declared duly elected by a majority of 185 electoral votes against 184. The decision may have been right as matter of law, — it is still debated by lawyers, — and there had been so much force and fraud on both sides in Florida, Louisiana, and South Carolina, that no one can say on which side substantial justice lay. Mr. Tilden deserves the credit of having induced his friends both to agree to a compromise slightly to his own disadvantage, and to accept peaceably, though with loud and long complaints, a result which baffled their hopes.

I tell the story here because it points to a grave danger in the presidential system. The stake played for is so high that the temptation to fraud is immense; and as the ballots given for the electors by the people are received and counted by State authorities under State laws, an unscrupulous State faction has opportunities for fraud at its command. In 1887 Congress, having had the subject pressed upon its attention by successive Presidents, took steps to provide against a recurrence of the danger described. It passed a statute enacting that tribunals appointed in and by each State shall determine what electoral votes from the State are legal votes; and that if the State has appointed no such tribunal, the two Houses of Congress shall determine which votes (in case of double returns) are legal. If the Houses differ the vote of the State is lost. It is, of course, possible under this plan that the State tribunal may decide unfairly; but the main thing is to secure some decision. Unfairness is better than uncertainty.

A President is removable during his term of office only by means of impeachment, a procedure familiar on both sides of the Atlantic in 1787, when the famous trial of Warren Hastings was still lingering on at Westminster. Impeachment, which had played no small part in the development of English liberties, was deemed by the Americans of those days a valuable element in their new Constitution, for it enabled Congress to depose, and the fear of it might be expected to restrain, a treasonably ambitious President. In obedience to State precedents,[1]

[1] Impeachment was taken, not directly from English usage, but rather from the Constitutions of Virginia (1776) and Massachusetts (1780), which had, no doubt following the example of England, established this remedy against culpable officials.

it is by the House of Representatives that the President is impeached, and by the Senate, sitting as a law court, with the Chief Justice of the Supreme Court, the highest legal official of the country, as presiding officer, that he is tried. A two-thirds vote is necessary to conviction, the effect of which is simply to remove him from and disqualify him for office, leaving him "liable to indictment, trial, judgment, and punishment, according to law" (Constitution, Art. i. § 3, Art. ii. § 4). The impeachable offences are "treason, bribery, or other high crimes and misdemeanours," an expression which some have held to cover only indictable offences, while others extend it to include acts done in violation of official duty and against the interests of the nation.

As yet, Andrew Johnson is the only President who has been impeached. His foolish and headstrong conduct made his removal desirable, but as it was doubtful whether any single offence justified a conviction, several of the Senators politically opposed to him voted for acquittal. A two-thirds majority not having been secured upon any one article (the numbers being thirty-five for conviction, nineteen for acquittal) he was declared acquitted.

In case of the removal of a President by impeachment, or of his death, resignation, or inability to discharge his duties, the Vice-President steps into his place. The Vice-President is chosen at the same time, by the same electors, and in the same manner as the President. His only functions are to preside in the Senate and to succeed the President. Failing both President and Vice-President it was formerly provided by statute, not by the Constitution, that the presiding officer for the time being of the Senate should succeed to the presidency, and, failing him, the Speaker of the House of Representatives. To this plan there was the obvious objection that it might throw power into the hands of the party opposed to that to which the lately deceased President belonged; and it has therefore been now (by an Act of 1886) enacted that on the death of a President (including a Vice-President who has succeeded to the Presidency) the Secretary of State shall succeed, and after him other officers of the administration, in the order of their rank. Four Presidents (Harrison, Taylor, Lincoln, Garfield) have died in office, and been succeeded by Vice-Presidents,

and in the first and third of these instances the succeeding Vice-President has reversed the policy of his predecessor, and become involved in a quarrel with the party which elected him, such as has never yet broken out between a man elected to be President and his party. In practice very little pains are bestowed on the election of a Vice-President. The convention which selects the party candidates usually gives the nomination to this post to a man in the second rank, sometimes as a consolation to a disappointed candidate for the presidential nomination, sometimes to a friend of such a disappointed candidate in order to "placate" his faction, sometimes as a compliment to an elderly leader who is personally popular. If the party carries its candidate for President, it also as a matter of course carries its candidate for Vice-President, and thus if the President happens to die, a man of small account may step into the chief magistracy of the nation.

CHAPTER V

PRESIDENTIAL POWERS AND DUTIES

THE powers and duties of the President as head of the Federal executive are the following: —

Command of Federal army and navy and of militia of several States when called into service of the United States.
Power to make treaties, but with advice and consent of the Senate, *i.e.* consent of two-thirds of Senators present.
" to appoint ambassadors and consuls, Judges of Supreme Court, and all other higher Federal officers, but with advice and consent of Senate.
" to grant reprieves and pardons for offences against the United States, except in cases of impeachment.
" to convene both Houses on extraordinary occasions.
" to disagree with (*i.e.* to send back for reconsideration) any bill or resolution passed by Congress, but subject to the power of Congress to finally pass the same, after reconsideration, by a two-thirds majority in each House.
Duty to inform Congress of the state of the Union, and to recommend measures to Congress.
" to commission all the officers of the United States.
" to receive foreign ambassadors.
" to take care that the laws be faithfully executed.

These functions group themselves into four classes —
Those which relate to foreign affairs.
Those which relate to domestic administration.
Those which concern legislation.
The power of appointment.

The conduct of foreign policy would be a function of the utmost importance did not America, happy America, stand apart in a world of her own, unassailable by European powers,

easily superior to the other republics of her continent, but with no present motive for aggression upon them. The President, however, has not a free hand in foreign policy. He cannot declare war, for that belongs to Congress, though to be sure he may, as President Polk did in 1845–6, bring affairs to a point at which it is hard for Congress to refrain from the declaration. Treaties require the approval of two-thirds of the Senate; and in order to secure this, it is usually necessary for the Executive to be in constant communication with the Foreign Affairs Committee of that body. The House of Representatives has no legal right to interfere, but it often passes resolutions enjoining or disapproving a particular line of policy; and sometimes invites the Senate to coincide in these expressions of opinion, which then become weightier.

The President is nowise bound by such resolutions, and has more than once declared that he does not regard them. But as some treaties, especially commercial treaties, cannot be carried out except by the aid of statutes, and as no war can be entered on without votes of money, the House of Representatives can sometimes indirectly make good its claim to influence. Many delicate questions, some of them not yet decided, have arisen upon these points, which the Constitution has, perhaps unavoidably, left in half-light. In all free countries it is most difficult to define the respective spheres of the legislature and executive in foreign affairs, for while publicity and parliamentary control are needed to protect the people, promptitude and secrecy are the conditions of diplomatic success. Practically, however, and for the purposes of ordinary business, the President is independent of the House, while the Senate, though it can prevent his settling anything, cannot keep him from unsettling everything. He, or rather his Secretary of State, for the President has rarely leisure to give close or continuous attention to foreign policy, retains an unfettered initiative, by means of which he may embroil the country abroad or excite passion at home.

The domestic authority of the President is in time of peace small, because by far the larger part of law and administration belongs to the State governments, and because Federal administration is regulated by statutes which leave little discretion to the executive. In war time, however, and especially in a civil

war, it expands with portentous speed. Both as commander-in-chief of the army and navy, and as charged with the "faithful execution of the laws," the President is likely to be led to assume all the powers which the emergency requires. How much he can legally do without the aid of statutes is disputed, for the acts of President Lincoln during the earlier part of the War of Secession, including his proclamation suspending the writ of *habeas corpus*, were subsequently legalized by Congress; but it is at least clear that Congress can make him, as it did make Lincoln, almost a dictator. And how much the war power may include appears in this, that by virtue of it and without any previous legislative sanction President Lincoln issued his emancipation proclamations of 1862 and 1863, declaring all slaves in the insurgent States to be thenceforth free, although these States were deemed to be in point of law still members of the Union.[1]

It devolves on the executive as well as on Congress to give effect to the provisions of the Constitution whereby a republican form of government is guaranteed to every State: and a State may, on the application of its legislature, or executive (when the legislature cannot be convened),[2] obtain protection against domestic violence. Where, as in Louisiana in 1873, there are two governments disputing by force the control of a State, or where an insurrection breaks out, as in Rhode Island in 1840–2, this power becomes an important one, for it involves the employment of troops, and enables the President (since it is usually on him that the duty falls) to establish the government he prefers to recognize.[3] Fortunately the case has been of rare occurrence.

The President has the right of speaking to the nation by addresses or proclamations, a right not expressly conferred by the Constitution, but inherent in his position. Occasions

[1] The proclamation was expressed not to apply to States which had not seceded, nor to such parts of seceding States as had then already been reconquered by the Northern armies. Slavery was finally legally extinguished everywhere by the thirteenth constitutional amendment of 1865.

[2] Const. Art. iv. § 4.

[3] In the Louisiana case Federal troops were employed: in the Rhode Island case the President authorized the employment of the militia of Massachusetts and Connecticut, but the Rhode Island troops succeeded in suppressing the rebellion, whose leader was ultimately convicted of high treason against the State and imprisoned.

requiring its exercise are uncommon. On entering office, it is usual for the new magistrate to issue an inaugural address, stating his views on current public questions. Washington also put forth a farewell address, but Jackson's imitation of that famous document was condemned as a piece of vainglory. It is thought bad taste for the President to deliver stump speeches, and Andrew Johnson injured himself by the practice. But he retains that and all other rights of the ordinary citizen, including the right of voting at Federal as well as State elections in his own State. And he has sometimes taken an active, though a covert, share in the councils of his own party.

The position of the President as respects legislation is a peculiar one. The King of England is a member of the English legislature, because Parliament is in theory his Great Council which he summons and in which he presides, hearing the complaints of the people, and devising legislative remedies.[1] It is as a member of the legislature that he assents to the bills it presents to him, and the term "veto power," since it suggests an authority standing outside to approve or reject, does not happily describe his right of dealing with a measure which has been passed by the council over which he is deemed to preside, though he now no longer appears in it except at the beginning and ending of a session. The American President is not a member of either House of Congress. He is a separate authority whom the people, for the sake of protecting themselves against abuses of legislative power, have associated with the legislature for the special purpose of arresting its action by his disapproval.[2] So again the King of England can initiate legislation. According to the older Constitution, statutes purported to be made, and were till the middle of the fifteenth century actually made, by him, but "with the advice and consent of the Lords Spiritual and Temporal and of the

[1] It need hardly be said that the actual separation of Parliament into two branches, each of which deliberates apart under the presidency of its own chairman (the chairman of one House named by the sovereign, whom he represents, that of the other chosen by the House, but approved by the sovereign), does not exclude the theory that the King, Lords, and Commons constitute the common council of the nation.

[2] The term "veto" was not used in the Convention of 1787: men talked of the President's "qualified negative."

Commons." According to modern practice, nearly all important measures are brought into Parliament by his ministers, and nominally under his instructions. The American President cannot introduce bills, either directly or through his ministers, for they do not sit in Congress.[1] All that the Constitution permits him to do in this direction is to inform Congress of the state of the nation, and to recommend the measures which his experience in administration shows to be necessary. This latter function is discharged by the messages which the President addresses to Congress. The most important is that sent at the beginning of each session.

George Washington used to deliver his addresses orally, like an English king, and drove in a coach and six to open Congress with something of an English king's state. But Jefferson, when his turn came in 1801, whether from republican simplicity, as he said himself, or because he was a poor speaker, as his critics said, began the practice of sending communications in writing; and this has been followed ever since. The message usually discusses the leading questions of the moment, indicates mischiefs needing a remedy, and suggests the requisite legislation. But as no bills are submitted by the President, and as, even were he to submit them, no one of his ministers sits in either House to explain and defend them, the message is a shot in the air without practical result. It is rather a manifesto, or declaration of opinion and policy, than a step towards legislation. Congress is not moved: members go their own ways and bring in their own bills.

Far more effective is the President's part in the last stage of legislation, for here he finds means provided for carrying out his will. When a bill is presented to him, he may sign it, and therewith make it law. If, however, he disapproves of it, he

[1] Nevertheless, the *Congressional Globe* for July 14, 1862, records that "The President (*pro tempore*) of the Senate presented the following message from the President of the United States: 'Fellow Citizens of the Senate and the House of Representatives: Herewith is the draft of a bill to compensate any State which may abolish slavery within its limits, the passage of which, substantially as presented, I respectfully and earnestly recommend. Abraham Lincoln.'" The bill was thereupon read a second time, and a debate arose as to whether the President had a right to submit bills. In the House the message as a whole was referred to the Special Committee on Emancipation. This seems to be the only instance in which a President has submitted a draft bill.

returns it within ten days to the House in which it originated, with a statement of his grounds of disapproval. If both Houses take up the bill again and pass it by a two-thirds majority in each House, it becomes law forthwith without requiring the President's signature.[1] If it fails to obtain this majority it drops.

Considering that the arbitrary use, by George III. and his colonial governors, of the power of refusing bills passed by a colonial legislature had been a chief cause of the Revolution of 1776, it is to the credit of the Americans that they inserted this apparently undemocratic provision (which, however, existed in the Constitution of Massachusetts of 1780) in the Constitution of 1789. It has worked wonderfully well. Most Presidents have employed it sparingly, and only where they felt either that there was a case for delay, or that the country would support them against the majority in Congress. Perverse or headstrong Presidents have been generally defeated by the use of the two-thirds vote to pass the bill over their objections. Washington "returned" or vetoed two bills only; his successors down till 1830, seven. Jackson made a bolder use of his power — a use which his opponents denounced as opposed to the spirit of the Constitution: yet until the accession of President Cleveland in 1885 the total number vetoed was only 132 (including the so-called pocket vetoes) in ninety-six years.[2] Mr. Cleveland vetoed 301, the great majority being bills for granting pensions to persons who served in the Northern armies during the War of Secession.[3] Though many of

[1] If Congress adjourns within the ten days allowed the President for returning the bill it is lost. His retaining it under these circumstances at the end of a session is popularly called a "pocket veto."

[2] Of these 132 (some reckon 128), 21 emanated from Johnson and 43 from Grant, while John Adams, Jefferson, J. Q. Adams, Van Buren, Taylor, and Fillmore sent no veto messages at all. (W. H. Harrison and Garfield died before they had any opportunity.) Among the most important vetoes were those of several Reconstruction bills by Johnson (these were re-passed by two-thirds votes), that of a paper currency measure, the so-called Inflation Bill by Grant, and that of the Dependent Pension Bill by Cleveland. No bill was passed "over a veto" until 1845. Presidents have occasionally (*e.g.* Lincoln more than once) in signing a bill stated objections to it which Congress has thereupon obviated by supplementary legislation.

[3] Out of these 433 vetoed bills only 29 were passed over the veto, 15 of these in the time of Johnson.

The numbers are differently reckoned by different authorities. I have here followed the calculation of Mr. E. C. Mason, in his clear and useful essay in *Harvard Historical Monographs*, Boston, 1891.

these bills had been passed with little or no opposition, two only were re-passed over his veto. The only President who acted recklessly was Andrew Johnson. In the course of his three years' struggle with Congress, he returned the chief bills passed for carrying out their Reconstruction policy, but as the majority opposed to him was large in both Houses, these bills were promptly passed over his veto.

So far from exciting the displeasure of the people by resisting the will of their representatives, a President generally gains popularity by the bold use of his veto power. It conveys the impression of firmness; it shows that he has a view and does not fear to give effect to it. The nation, which has often good grounds for distrusting Congress, a body liable to be moved by sinister private influences, or to defer to the clamour of some noisy section outside, looks to the man of its choice to keep Congress in order, and has approved the extension which practice has given to the power. The President's "qualified negative" was proposed by the Convention of 1787 for the sake of protecting the Constitution, and in particular, the executive, from Congressional encroachments. It has now come to be used on grounds of general expediency, to defeat any measure which the executive deems pernicious either in principle or in its probable results.

The reasons why the veto provisions of the Constitution have succeeded appear to be two. One is that the President, being an elective and not a hereditary magistrate, is responsible to the people, and has the weight of the people behind him. The people regard him as an indispensable check, not only upon the haste and heedlessness of their representatives, the faults which the framers of the Constitution chiefly feared, but upon their tendency, a tendency whose mischievous force experience has revealed, to yield either to pressure from any section of their constituents, or to temptations of a private nature. The other reason is that a veto need never take effect unless there is a minority exceeding one-third in one or other House of Congress, which agrees with the President. Such a minority shares his responsibility and encourages him to resist the threats of a majority: while if he has no substantial support in public opinion, his opposition is easily overborne. Hence this arrangement is preferable to a plan such as that of

the French Constitution of 1791 (under which the king's veto could be overridden by passing a bill in three successive years), for enabling the executive simply to delay the passing of a measure which may be urgent, or which a vast majority of the legislature may desire.

In its practical working the presidential veto power furnishes an interesting illustration of the tendency of unwritten or flexible constitutions to depart from, of written or rigid constitutions to cleave to, the letter of the law. The strict legal theory of the rights of the head of the State is in this point exactly the same in England and in America. But whereas it is now the undoubted duty of an English king to assent to every bill passed by both Houses of Parliament, however strongly he may personally disapprove its provisions, it is the no less undoubted duty of an American President to exercise his independent judgment on every bill, not sheltering himself under the representatives of the people, or foregoing his own opinion at their bidding.[1]

As the President is charged with the whole Federal administration, and responsible for its due conduct, he must of course be allowed to choose his executive subordinates. But as he may abuse this tremendous power the Constitution associates the Senate with him, requiring the "advice and consent" of that body to the appointments he makes.[2] This confirming power has become a political factor of the highest moment. The framers of the Constitution probably meant nothing more than that the Senate should check the President by rejecting nominees who were personally unfit for the post to which he proposed to appoint them. The Senate has always, except in its struggle with President Johnson, left the President free to choose his Cabinet ministers. But it early assumed the right of rejecting a nominee to any other office on any ground which it pleased, as for instance, if it disapproved his political affiliations, or wished to spite the President.

Presently the senators from the State wherein a Federal office

[1] The practical disuse of the "veto power" in England is due not merely to the decline in the authority of the Crown, but to the fact that, since the Revolution, the Crown acts only on the advice of responsible ministers, who necessarily demand a majority in the House of Commons.

[2] Congress is however permitted to vest in the President alone the appointment to such "inferior offices" as it thinks fit.

to which the President had made a nomination lay, being the persons chiefly interested in the appointment, and most entitled to be listened to by the rest of the Senate when considering it, claimed to have a paramount voice in deciding whether the nomination should be confirmed. Their colleagues approving, they then proceeded to put pressure on the President. They insisted that before making a nomination to an office in any State he should consult the senators from that State who belonged to his own party, and be guided by their wishes. Such an arrangement benefited all senators alike, because each obtained the right of practically dictating the appointments to those Federal offices which he most cared for, viz. those within his own State; and each was therefore willing to support his colleagues in securing the same right for themselves as regarded their States respectively. Of course when a senator belonged to the party opposed to the President, he had no claim to interfere, because places are as a matter of course given to party adherents only. When both senators belonged to the President's party they agreed among themselves as to the person whom they should require the President to nominate. By this system, which obtained the name of the "Courtesy of the Senate," the President was practically enslaved as regards appointments, because his refusal to be guided by the senator or senators within whose State the office lay exposed him to have his nomination rejected.

The senators, on the other hand, obtained a mass of patronage by means of which they could reward their partisans, control the Federal civil servants of their State, and build up a faction devoted to their interests.[1] Successive Presidents chafed under the yoke, and sometimes carried their nominees either by making a bargain or by fighting hard with the senators who sought to dictate to them. But it was generally more prudent to yield, for an offended senator could avenge a defeat by playing the President a shrewd trick in some other matter; and as the business of confirmation is transacted in

[1] As the House of Representatives could not allow the Senate to engross all the Federal patronage, there has been a tendency towards a sort of arrangement, according to which the greater State offices belong to the senators, while as regards the lesser ones, lying within their respective congressional districts, members of the House are recognized as entitled to recommend candidates.

secret session, intriguers have little fear of the public before their eyes. The senators might, moreover, argue that they knew best what would strengthen the party in their State, and that the men of their choice were just as likely to be good as those whom some private friend suggested to the President. Thus the system throve and still thrives.

It need hardly be added that the "Courtesy of the Senate" would never have attained its present strength but for the growth, in and since the time of President Jackson, of the so-called Spoils System, whereby holders of Federal offices have been turned out at the accession of a new President to make way for the aspirants whose services, past or future, he is expected to requite or secure by the gift of places.

The right of the President to remove from office has given rise to long controversies on which I can only touch. In the Constitution there is not a word about removals; and very soon after it had come into force the question arose whether, as regards those offices for which the confirmation of the Senate is required, the President could remove without its consent. Hamilton had argued in the *Federalist* (though there is reason to believe that he afterwards changed his opinion) that the President could not so remove, because it was not to be supposed that the Constitution meant to give him so immense and dangerous a reach of power. Madison argued soon after the adoption of the Constitution that it did permit him so to remove, because the head of the executive must have subordinates whom he can trust, and may discover in those whom he has appointed defects fatal to their usefulness. This was also the view of Chief-Justice Marshall. When the question came to be settled in the Senate during the presidency of Washington, Congress, influenced perhaps by respect for his perfect uprightness, took the Madisonian view and recognized the power of removal as vested in the President alone.

So matters stood till a conflict arose in 1866 between President Johnson and the Republican majority in both Houses of Congress. In 1867 Congress, fearing that the President would dismiss a great number of officials who sided with it against him, passed an Act known as the Tenure of Office Act, which made the consent of the Senate necessary to the removal of office-holders, even of the President's (so-called) Cabinet minis-

ters, permitting him only to suspend them from office during the time when Congress was not sitting. The constitutionality of this Act has been much doubted, and its policy is now generally condemned. It was a blow struck in the heat of passion. When President Grant succeeded in 1869, the Act was greatly modified, and in 1887 it was repealed.

How dangerous it is to leave all offices tenable at the mere pleasure of a partisan executive using them for party purposes, has been shown by the fruits of the Spoils System. On the other hand a President ought to be free to choose his chief advisers and ministers, and even in the lower ranks of the civil service it is hard to secure efficiency if a specific cause, such as could be proved to a jury, must be assigned for dismissal.

The Constitution permits Congress to vest in the Courts of Law or in "the heads of departments" the right of appointing to "inferior offices." This provision has been used to remove many posts from the nomination of the President, and by the Civil Service Reform Act of 1883 competitive examinations have been instituted for about 34,000. A considerable number, however, remain in the free gift of the President; while even as regards those which lie with his ministers, he may be invoked if disputes arise between the minister and politicians pressing the claims of their respective friends. The business of nominating is in ordinary times so engrossing as to leave the chief magistrate of the nation little time for his other functions.

Artemus Ward's description of Abraham Lincoln swept along from room to room in the White House by a rising tide of office-seekers is hardly an exaggeration. From the 4th of March, when Mr. Garfield came into power, till he was shot in the July following, he was engaged almost incessantly in questions of patronage.[1] Yet the President's individual judgment has little scope. He must reckon with the Senate; he must requite the supporters of the men to whom he owes his election; he must so distribute places all over the country as

[1] It is related that a friend, meeting Mr. Lincoln one day during the war, observed, "You look anxious, Mr. President; is there bad news from the front?" "No," answered the President, "it isn't the war: it's that postmastership at Brownsville, Ohio."

to keep the local wire-pullers in good humour, and generally strengthen the party by "doing something" for those who have worked or will work for it. Although the minor posts are practically left to the nomination of the senators or congressmen from the State or district, conflicting claims give infinite trouble, and the more lucrative offices are numerous enough to make the task of selection laborious as well as thankless and disagreeable.

In every country statesmen find the dispensing of patronage the most disagreeable part of their work; and the more conscientious they are, the more does it worry them. No one has more to gain from a thorough scheme of civil service reform than the President. The present system makes a wire-puller of him. It throws work on him unworthy of a fine intellect, and for which a man of fine intellect may be ill qualified. On the other hand the President's patronage is, in the hands of a skilful intriguer, an engine of far-spreading potency. By it he can oblige a vast number of persons, can bind their interests to his own, can fill important places with the men of his choice. Such authority as he has over the party in Congress, and therefore over the course of legislation, such influence as he exerts on his party in the several States, and therefore over the selection of candidates for Congress, is due to his patronage. Unhappily, the more his patronage is used for these purposes, the more it is apt to be diverted from the aim of providing the country with the best officials.

In quiet times the power of the President is not great. He is hampered at every turn by the necessity of humouring his party. He is so much engrossed by the trivial and mechanical parts of his work as to have little leisure for framing large schemes of policy, while in carrying them out he needs the co-operation of Congress, which may be jealous, or indifferent, or hostile. He has less influence on legislation,—that is to say, his individual volition makes less difference to the course legislation takes, than the Speaker of the House of Representatives. In troublous times it is otherwise, for immense responsibility is then thrown on one who is both the commander-in-chief and the head of the civil executive. Abraham Lincoln wielded more authority than any single Englishman has done since Oliver Cromwell. It is true that the ordinary

law was for some particular purposes practically suspended during the War of Secession. But it will always have to be similarly suspended in similar crises, and the suspension makes the President a sort of dictator.

Setting aside these exceptional moments, the dignity and power of the President have, except as respects the increase in the quantity of his patronage, grown but little during the last fifty years, that is, since the time of Andrew Jackson, the last President who, not so much through his office as by his personal ascendency and the vehemence of his character, led and guided his party from the chair. Here, too, one sees how a rigid or supreme Constitution serves to keep things as they were. But for its iron hand, the office would surely, in a country where great events have been crowded on one another and opinion changes rapidly under the teaching of events, have either risen or fallen, have gained strength or lost it.

In no European country is there any personage to whom the President can be said to correspond. If we look at parliamentary countries like England, Italy, Belgium, he resembles neither the sovereign nor the prime minister, for the former is not a party chief at all, and the latter is palpably nothing else. The President enjoys more authority, if less dignity, than a European king. He has powers for the moment narrower than a European prime minister, but these powers are more secure, for they do not depend on the pleasure of a parliamentary majority, but run on to the end of his term. One naturally compares him with the French President, but the latter has a prime minister and cabinet, dependent on the Chamber, at once to relieve and to eclipse him: in America the President's cabinet is a part of himself and has nothing to do with Congress.

The difficulty in forming a just estimate of the President's power arises from the fact that it differs so much under ordinary and under extraordinary circumstances. This is a result which republics might seem specially concerned to prevent, and yet it is specially frequent under republics, as witness the cases of ancient Rome and of the Italian cities in the Middle Ages. In ordinary times the President may be compared to the senior or managing clerk in a large business establishment, whose chief function is to select his subordinates, the policy of the concern being in the hands of the board of directors.

But when foreign affairs become critical, or when disorders within the Union require his intervention, — when, for instance, it rests with him to put down an insurrection or to decide which of two rival State governments he will recognize and support by arms, everything may depend on his judgment, his courage, and his hearty loyalty to the principles of the Constitution.

It used to be thought that hereditary monarchs were strong because they reigned by a right of their own, not derived from the people. A President is strong for the exactly opposite reason, because his rights come straight from the people. We shall have frequent occasion to observe that nowhere is the rule of public opinion so complete as in America, or so direct, that is to say, so independent of the ordinary machinery of government. Now the President is deemed to represent the people no less than do the members of the legislature. Public opinion governs by and through him no less than them, and makes him powerful even against a popularly elected Congress.

Although recent Presidents have shown no disposition to strain their authority, it is still the fashion in America to be jealous of the President's action, and to warn citizens against what is called "the one man power." General Ulysses S. Grant was hardly the man to make himself a tyrant, yet the hostility to a third term of office which moved many people who had not been alienated by the faults of his administration, rested not merely on reverence for the example set by Washington, but also on the fear that a President repeatedly chosen would become dangerous to republican institutions. This particular alarm seems to a European groundless. I do not deny that a really great man might exert ampler authority from the presidential chair than its recent occupants have done. The same observation applies to the Popedom and even to the English throne. The President has a position of immense dignity, an unrivalled platform from which to impress his ideas upon the people. But it is hard to imagine a President overthrowing the existing Constitution. He has no standing army, and he cannot create one. Congress can checkmate him by stopping supplies. There is no aristocracy to rally round him. Every State furnishes an independent centre of resistance. If he were to attempt a *coup d'état*, it could only be by appealing to the people against Congress. and Congress could hardly, con-

sidering that it is re-elected every two years, attempt to oppose the people. One must suppose a condition bordering on civil war, and the President putting the resources of the executive at the service of one of the intending belligerents, already strong and organized, in order to conceive a case in which he will be formidable to freedom. If there be any danger, it would seem to lie in another direction. The larger a community becomes the less does it seem to respect an assembly, the more is it attracted by an individual man. A bold President who knew himself to be supported by a majority in the country, might be tempted to override the law, and deprive the minority of the protection which the law affords it. He might be a tyrant, not against the masses, but with the masses. But nothing in the present state of American politics gives weight to such apprehensions.

CHAPTER VI

OBSERVATIONS ON THE PRESIDENCY

Although the President has been, not that independent good citizen whom the framers of the Constitution contemplated, but, at least during the last sixty years, a party man, seldom much above the average in character or abilities, the office has attained the main objects for which it was created. Such mistakes as have been made in foreign policy, or in the conduct of the administrative departments, have been rarely owing to the constitution of the office or to the errors of its holder. This is more than one who should review the history of Europe during the last hundred years could say of any European monarchy. Nevertheless, the faults chargeable on hereditary kingship, must not make us overlook certain defects incidental to the American presidency, perhaps to any plan of vesting the headship of the State in a person elected for a limited period.

In a country where there is no hereditary throne nor hereditary aristocracy, an office raised far above all other offices offers too great a stimulus to ambition. This glittering prize, always dangling before the eyes of prominent statesmen, has a power stronger than any dignity under a European crown to lure them (as it lured Clay and Webster) from the path of straightforward consistency. One who aims at the presidency — and all prominent politicians do aim at it — has the strongest possible motives to avoid making enemies. Now a great statesman ought to be prepared to make enemies. It is one thing to try to be popular — an unpopular man will be uninfluential — it is another to seek popularity by courting every section of your party. This is the temptation of presidential aspirants.

A second defect is that the presidential election, occurring

once in four years, throws the country for several months into a state of turmoil, for which there may be no occasion. Perhaps there are no serious party issues to be decided, perhaps the best thing would be that the existing administration should pursue the even tenor of its way. The Constitution, however, requires an election to be held, so the whole costly and complicated machinery of agitation is put in motion; and if issues do not exist, they have to be created. Professional politicians who have a personal interest in the result, because it involves the gain or loss of office to themselves, conduct what is called a "campaign," and the country is forced into a (possibly factitious) excitement, from midsummer, when each party selects the candidate whom it will nominate, to the first week of November, when the contest is decided. There is some political education in the process, but it is bought dearly, not to add that business, and especially finance, is disturbed, and much money spent unproductively.

Again, these regularly recurring elections produce a discontinuity of policy. Even when the new President belongs to the same party as his predecessor, he usually nominates a new Cabinet, having to reward his especial supporters. Many of the inferior offices are changed; men who have learned their work make way for others who have everything to learn. If the new President belongs to the opposite party, the change of officials is far more sweeping, and involves larger changes of policy.

Fourthly. The fact that he is re-eligible once, but (practically) only once, operates unfavourably on the President. He is tempted to play for a re-nomination by so pandering to active sections of his own party, or so using his patronage to conciliate influential politicians, as to make them put him forward at the next election. On the other hand, if he is in his second term of office, he has no longer much motive to regard the interests of the nation at large, because he sees that his own political death is near. It may be answered that these two evils will correct one another, that the President will in his first term be anxious to win the respect of the nation, in his second he will have no motive for yielding to the unworthy pressure of party wirepullers; while in reply to the suggestion that if he were held ineligible for the next term, but eligible for any future term, both sets of evils might be avoided, and

both sets of benefits secured, it can be argued that such a provision would make that breach in policy which may now happen only once in eight years, necessarily happen once in four years. It would, for instance, have prevented the re-election of Abraham Lincoln in 1864.

The founders of the Southern Confederacy of 1861–5 were so much impressed by the objections to the present system that they provided that their President should hold office for six years, but not be re-eligible.

Fifthly. An outgoing President is a weak President. During the four months of his stay in office after his successor has been chosen, he declines, except in cases of extreme necessity, to take any new departure, to embark on any executive policy which cannot be completed before he quits office. This is, of course, even more decidedly the case if his successor belongs to the opposite party.

Lastly. The result of an election may be doubtful, not from equality of votes, for this is provided against, but from a dispute as to the validity of votes given in or reported from the States. The difficulty which arose in 1876 will not, owing to the legislation of 1887, recur in quite the same form. But cases may arise in which the returns from a State of its electoral votes will, because notoriously obtained by fraud or force, fail to be recognized as valid by the party whose candidate they prejudice. No presidential election passes without charges of this kind, and these charges are not always unfounded. Should manifest unfairness coincide with popular excitement over a really important issue, the self-control of the people, which in 1877, when no such issue was involved, restrained the party passions of their leaders, may prove unequal to the strain of such a crisis.

Further observations on the President, as a part of the machinery of government, will be better reserved for the discussion of the relations of the executive and legislative departments. I will therefore only observe here that, even when we allow for the defects last enumerated, the presidential office, if not one of the best features of the American Constitution, is nowise to be deemed a failure. The problem of constructing a stable executive in a democratic country is indeed so immensely difficult that anything short of a failure deserves

to be called a success. Now the President has, during more than a hundred years, carried on the internal administrative business of the nation with due efficiency. Once or twice, as when Jefferson purchased Louisiana, and Lincoln emancipated the slaves in the revolted States, he has courageously ventured on stretches of authority, held at the time to be doubtfully constitutional, yet necessary, and approved by the judgment of posterity. He has kept the machinery working quietly and steadily when Congress has been distracted by party strife, or paralyzed by the dissensions of the two Houses, or enfeebled by the want of first-rate leaders. The executive has been able, at moments of peril, to rise almost to a dictatorship, as during the War of Secession, and, when peace returned, to sink back into its proper constitutional position. It has shown no tendency so to dwarf the other authorities of the State as to pave the way for a monarchy.

Europeans are struck by the faults of a plan which plunges the nation into a whirlpool of excitement once every four years, and commits the headship of the State to a party leader chosen for a short period. But there is another aspect in which the presidential election may be regarded, and one whose importance is better appreciated in America than in Europe. The election is a solemn periodical appeal to the nation to review its condition, the way in which its business has been carried on, the conduct of the two great parties. It stirs and rouses the nation as nothing else does, forces every one not merely to think about public affairs but to decide how he judges the parties. It is a direct expression of the will of twelve millions of voters, a force before which everything must bow. It refreshes the sense of national duty; and at great crises it intensifies national patriotism.

A presidential election is sometimes, as in 1800, and as again most notably in 1860 and 1864, a turning-point in history. In form it is nothing more than the choice of an administrator who cannot influence policy otherwise than by refusing his assent to bills. In reality it is the deliverance of the mind of the people upon all such questions as they feel able to decide. A curious parallel may in this respect be drawn between it and a general election of the House of Commons in England. A general election is in form a choice of representatives, with reference

primarily to their views upon various current questions. In substance it is often a national vote, committing executive power to some one prominent statesman. Thus the elections of 1868, 1874, 1880, were practically votes of the nation to place Mr. Gladstone or Mr. Disraeli at the head of the government. So conversely in America, a presidential election, which purports to be merely the selection of a man, is often in reality a decision upon issues of policy, a condemnation of the course taken by one party, a mandate to the other to follow some different course.

Socially regarded, the American presidency deserves nothing but admiration. The President is simply the first citizen of a free nation, depending for his dignity on no title, no official dress, no insignia of state. It was originally proposed, doubtless in recollection of the English Commonwealth of the seventeenth century, to give him the style of "Highness," and "Protector of the Liberties of the United States." Others suggested "Excellency";[1] and Washington is said to have had leanings to the Dutch style of "High Mightiness." The head of the ruling President does not appear on coins, nor even on postage stamps. His residence at Washington, called officially "the Executive Mansion," and familiarly "the White House," stands in a shrubbery, and has the air of a large suburban villa rather than of a palace. The rooms, though spacious, are not spacious enough for the crowds that attend the public receptions. The President's salary, which is only $50,000 a year, does not permit display, nor indeed is display expected from him.

Washington has now become one of the handsomest capitals in the world, and cultivates the graces and pleasures of life with eminent success. Besides its political society and its diplomatic society, it is becoming a winter resort for men of wealth and leisure from all over the continent. It is a place where a court might be created, did any one wish to create it. No President has made the attempt; and as the earlier career of the chief magistrate and his wife has seldom qualified them to lead the world of fashion, none is likely to make it.

[1] In ridicule of this the more democratic members of Congress proposed to call that more ornamental than useful officer the Vice-President "His superfluous Excellency."

To a European observer, weary of the slavish obsequiousness and lip-deep adulation with which the members of reigning families are treated on the eastern side of the Atlantic, fawned on in public and carped at in private, the social relations of an American President to his people are eminently refreshing.

There is a great respect for the office, and a corresponding respect for the man as the holder of the office, if he has done nothing to degrade it. There is no servility, no fictitious self-abasement on the part of the citizens, but a simple and hearty deference to one who represents the majesty of the nation, the sort of respect which the proudest Roman paid to the consulship, even if the particular consul was, like Cicero, a "new man." The curiosity of the visitors who throng the White House on reception days is sometimes too familiar; but this fault tends to disappear, and Presidents have now more reason to complain of the persecutions they endure from an incessantly observant journalism. After oscillating between the ceremonious state of George Washington, who drove to open Congress in his coach and six, with outriders and footmen in livery, and the ostentatious plainness of Citizen Jefferson, who would ride up alone and hitch his horse to the post at the gate,[1] the President has settled down into an attitude between that of the mayor of a great English town on a public occasion, and that of a European cabinet minister on a political tour. He is followed about and fêted, and in every way treated as the first man in the company; but the spirit of equality which rules the country has sunk too deep into every American nature for him to expect to be addressed with bated breath and whispering reverence. He has no military guard, no chamberlains or grooms-in-waiting; his everyday life is simple; his wife enjoys precedence over all other ladies, but is visited and received just like other ladies; he is surrounded by no such pomp and enforces no such etiquette as that which belongs to the governors even of second-class English colonies, not to speak of the viceroys of India and Ireland.

[1] Mr. H. Adams (*First Administration of Jefferson*, vol. i. p. 197) has, however, shown that at his inauguration Jefferson walked.

CHAPTER VII

WHY GREAT MEN ARE NOT CHOSEN PRESIDENTS

EUROPEANS often ask, and Americans do not always explain, how it happens that this great office, the greatest in the world, unless we except the Papacy, to which any one can rise by his own merits, is not more frequently filled by great and striking men. In America, which is beyond all other countries the country of a "career open to talents," a country, moreover, in which political life is unusually keen and political ambition widely diffused, it might be expected that the highest place would always be won by a man of brilliant gifts. But since the heroes of the Revolution died out with Jefferson and Adams and Madison, no person except General Grant has reached the chair whose name would have been remembered had he not been President, and no President except Abraham Lincoln has displayed rare or striking qualities in the chair.

Several reasons may be suggested for the fact, which Americans are themselves the first to admit.

One is that the proportion of first-rate ability drawn into politics is smaller in America than in most European countries. This is a phenomenon whose causes must be elucidated later: in the meantime it is enough to say that in France and Italy, where half-revolutionary conditions have made public life exciting and accessible; in Germany, where an admirably organized civil service cultivates and develops statecraft with unusual success; in England, where many persons of wealth and leisure seek to enter the political arena, while burning questions touch the interests of all classes and make men eager observers of the combatants, the total quantity of talent devoted to parliamentary or administrative work is larger, relatively to the population, than in America, where much of the best ability, both for thought and for action, for

planning and for executing, rushes into a field which is comparatively narrow in Europe, the business of developing the material resources of the country.

Another is that the methods and habits of Congress, and indeed of political life generally, give fewer opportunities for personal distinction, fewer modes in which a man may commend himself to his countrymen by eminent capacity in thought, in speech, or in administration, than is the case in the free countries of Europe.

A third reason is that eminent men make more enemies, and give those enemies more assailable points, than obscure men do. They are therefore in so far less desirable candidates. It is true that the eminent man has also made more friends, that his name is more widely known, and may be greeted with louder cheers. Other things being equal, the famous man is preferable. But other things never are equal. The famous man has probably attacked some leaders in his own party, has supplanted others, has expressed his dislike to the crotchet of some active section, has perhaps committed errors which are capable of being magnified into offences. No man stands long before the public and bears a part in great affairs without giving openings to censorious criticism. Fiercer far than the light which beats upon a throne is the light which beats upon a presidential candidate, searching out all the recesses of his past life. Hence, when the choice lies between a brilliant man and a safe man, the safe man is preferred. Party feeling, strong enough to carry in on its back a man without conspicuous positive merits, is not always strong enough to procure forgiveness for a man with positive faults

A European finds that this phenomenon needs in its turn to be explained, for in the free countries of Europe brilliancy, be it eloquence in speech, or some striking achievement in war or administration, or the power through whatever means of somehow impressing the popular imagination, is what makes a leader triumphant. Why should it be otherwise in America? Because in America party loyalty and party organization have been hitherto so perfect that any one put forward by the party will get the full party vote if his character is good and his "record," as they call it, unstained.

The safe candidate may not draw in quite so many votes from the moderate men of the other side as the brilliant one would, but he will not lose nearly so many from his own ranks. Even those who admit his mediocrity will vote straight when the moment for voting comes. Besides, the ordinary American voter does not object to mediocrity. He has a lower conception of the qualities requisite to make a statesman than those who direct public opinion in Europe have. He likes his candidate to be sensible, vigorous, and, above all, what he calls "magnetic," and does not value, because he sees no need for, originality or profundity, a fine culture or a wide knowledge. Candidates are selected to be run for nomination by knots of persons who, however expert as party tacticians, are usually commonplace men; and the choice between those selected for nomination is made by a very large body, an assembly of over eight hundred delegates from the local party organizations over the country, who are certainly no better than ordinary citizens. How this process works will be seen more fully when I come to speak of those Nominating Conventions which are so notable a feature in American politics.

It must also be remembered that the merits of a President are one thing and those of a candidate another thing. An eminent American is reported to have said to friends who wished to put him forward, "Gentlemen, let there be no mistake. I should make a good President, but a very bad candidate." Now to a party it is more important that its nominee should be a good candidate than that he should turn out a good President. A nearer danger is a greater danger. As Saladin says in *The Talisman*, "A wild cat in a chamber is more dangerous than a lion in a distant desert." It will be a misfortune to the party, as well as to the country, if the candidate elected should prove a bad President. But it is a greater misfortune to the party that it should be beaten in the impending election, for the evil of losing national patronage will have come four years sooner. "B" (so reason the leaders), "who is one of our possible candidates, may be an abler man than A, who is the other. But we have a better chance of winning with A than with B, while X, the candidate of our opponents, is anyhow no better than A. We must therefore

run A." This reasoning is all the more forcible because the previous career of the possible candidates has generally made it easier to say who will succeed as a candidate than who will succeed as a President; and because the wirepullers with whom the choice rests are better judges of the former question than of the latter.

After all, too, a President need not be a man of brilliant intellectual gifts. His main duties are to be prompt and firm in securing the due execution of the laws and maintaining the public peace, careful and upright in the choice of the executive officials of the country. Eloquence, whose value is apt to be overrated in all free countries, imagination, profundity of thought or extent of knowledge, are all in so far a gain to him that they make him "a bigger man," and help him to gain over the nation an influence which, if he be a true patriot, he may use for its good. But they are not necessary for the due discharge in ordinary times of the duties of his post. Four-fifths of his work is the same in kind as that which devolves on the chairman of a commercial company or the manager of a railway, the work of choosing good subordinates, seeing that they attend to their business, and taking a sound practical view of such administrative questions as require his decision. Firmness, common sense, and most of all, honesty, an honesty above all suspicion of personal interest, are the qualities which the country chiefly needs in its first magistrate.

So far we have been considering personal merits. But in the selection of a candidate many considerations have to be regarded besides the personal merits, whether of a candidate, or of a possible President. The chief of these considerations is the amount of support which can be secured from different States or from different "sections" of the Union, a term by which the Americans denote groups of States with a broad community of interest. State feeling and sectional feeling are powerful factors in a presidential election. The North-west, including the States from Ohio to Dakota, is now the most populous section of the Union, and therefore counts for most in an election. It naturally conceives that its interests will be best protected by one who knows them from birth and residence. Hence *prima facie* a North-western man makes the best candidate. A large State casts a heavier vote in the

election; and every State is of course more likely to be carried by one of its own children than by a stranger, because his fellow-citizens, while they feel honoured by the choice, gain also a substantial advantage, having a better prospect of such favours as the administration can bestow. Hence, *cæteris paribus*, a man from a large State is preferable as a candidate. The problem is further complicated by the fact that some States are already safe for one or other party, while others are doubtful. The North-western and New England States are most of them likely to go Republican: the Southern States are (at present) all of them certain to go Democratic. *Cæteris paribus*, a candidate from a doubtful State, such as New York and Indiana have usually been, is to be preferred.

Although several Presidents have survived their departure from office by many years, only one, John Quincy Adams, played a part in politics after quitting the White House.[1] It may be that the ex-President has not been a great leader before his accession to office; it may be that he does not care to exert himself after he has held and dropped the great prize, and found (one may safely add) how little of a prize it is. Something, however, must also be ascribed to other features of the political system of the country. It is often hard to find a vacancy in the representation of a given State through which to re-enter Congress; it is disagreeable to recur to the arts by which seats are secured. Past greatness is rather an encumbrance than a help to resuming a political career. Exalted power, on which the unsleeping eye of hostile critics was fixed, has probably disclosed all a President's weaknesses, and has either forced him to make enemies by disobliging adherents, or exposed him to censure for subservience to party interests. He is regarded as having had his day; he belongs already to the past, and unless, like Grant, he is endeared to the people by the memory of some splendid service, or is available to his party as a possible candidate for a further term of office, he soon sinks into the crowd or avoids neglect by retirement.

[1] J. Q. Adams was elected to the House of Representatives within three years from his presidency, and there became for seventeen years the fearless and formidable advocate of what may be called the national theory of the Constitution against the slaveholders.

We may now answer the question from which we started. Great men are not chosen Presidents, first because great men are rare in politics; secondly, because the method of choice does not bring them to the top; thirdly, because they are not, in quiet times, absolutely needed. Let us close by observing that the Presidents, regarded historically, fall into three periods, the second inferior to the first, the third rather better than the second.

Down till the election of Andrew Jackson in 1828, all the Presidents had been statesmen in the European sense of the word, men of education, of administrative experience, of a certain largeness of view and dignity of character. All except the first two had served in the great office of Secretary of State; all were well known to the nation from the part they had played. In the second period, from Jackson till the outbreak of the Civil War in 1861, the Presidents were either mere politicians, such as Van Buren, Polk, or Buchanan, or else successful soldiers,[1] such as Harrison or Taylor, whom their party found useful as figure-heads. They were intellectual pigmies beside the real leaders of that generation — Clay, Calhoun, and Webster. A new series begins with Lincoln in 1861. He and General Grant, his successor, who cover sixteen years between them, belong to the history of the world. The other less distinguished Presidents of this period contrast favourably with the Polks and Pierces of the days before the war, but they are not, like the early Presidents, the first men of the country. If we compare the nineteen Presidents who have been elected to office since 1789 with the nineteen English prime ministers of the same hundred years, there are but six of the latter, and at least eight of the former whom history calls personally insignificant, while only Washington, Jefferson, Lincoln, and Grant can claim to belong to a front rank represented in the English list by seven or possibly eight names. It would seem that the natural selection of the English parliamentary system, even as modified by the aristocratic habits of that country, has more tendency to bring the highest gifts to the highest place than the more artificial selection of America.

[1] Jackson himself was something of both politician and soldier, a strong character, but a narrow and uncultivated intellect.

CHAPTER VIII

THE CABINET

There is in the government of the United States no such thing as a Cabinet in the English sense of the term. But I use the term, not only because it is current in America to describe the chief ministers of the President, but also because it calls attention to the remarkable difference which exists between the great officers of State in America and the similar officers in the free countries of Europe.

Almost the only reference in the Constitution to the ministers of the President is that contained in the power given him to "require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices." All these departments have been created by Acts of Congress. Washington began in 1789 with four only, at the head of whom were the following four officials: —

Secretary of State.
Secretary of the Treasury.
Secretary of War.
Attorney-General.

In 1798 there was added a Secretary of the Navy, in 1829 a Postmaster-General,[1] in 1849 a Secretary of the Interior, and in 1888 a Secretary of Agriculture.

These eight now make up what is called the Cabinet.[2] Each

[1] The Postmaster-General had been previously deemed a subordinate in the Treasury department, although the office was organized by Act of Congress in 1794; he has been held to belong to the Cabinet since Jackson, in 1829, invited him to Cabinet meetings.

[2] There is also an Inter-state Commerce Commission, with large powers over railways, created in February 1887 by Act of Congress; a Labour Bureau erected into a department in 1888; a Fish Commission created in 1870; and a Civil Service Commission created in 1883.

receives a salary of $8000. All are appointed by the President, subject to the consent of the Senate (which is practically never refused), and may be removed by the President alone. Nothing marks them off from any other officials who might be placed in charge of a department, except that they are summoned by the President to his private council.

None of them can vote in Congress, Art. xi. § 6 of the Constitution providing that "no person holding any office under the United States shall be a member of either House during his continuance in office."

It deserves to be noticed, however, that the Constitution contains nothing to prevent ministers from being present in either House of Congress and addressing it,[1] as the ministers of the King of Italy or of the French President may do in either chamber of Italy or France. It is absolutely silent on the subject of communications between officials (other than the President) and the representatives of the people.

The President has the amplest range of choice for his ministers. He usually forms an entirely new Cabinet when he enters office, even if he belongs to the same party as his predecessor. He may take, he sometimes does take, men who not only have never sat in Congress, but have not figured in politics at all, who may never have sat in a State legislature nor held the humblest office.[2] Generally of course the persons chosen have already made for themselves a position of at least local importance. Often they are those to whom the new President owes his election, or to whose influence with the party he looks for support in his policy. Sometimes they have been his most prominent competitors for the party nominations. Thus Mr. Lincoln in 1861 appointed Mr. Seward and Mr. Chase to be his secretary of state and secretary of the treasury respectively, they being the two men who had come

[1] In February 1881 a committee of eight senators unanimously reported in favour of a plan to give seats (of course without the right to vote) in both Houses of Congress to Cabinet ministers, they to attend on alternate days in the Senate and in the House. The committee recommended that the necessary modification in the rules should be made, adding that they had no doubt of the constitutionality of the proposal. Nothing has so far been done to carry out this report.

[2] Only two members of Mr. Harrison's Cabinet, formed in 1889, had ever sat in Congress.

next after him in the selection by the Republican party of a presidential candidate.

The most dignified place in the Cabinet is that of the Secretary of State. It is the great prize often bestowed on the man to whom the President is chiefly indebted for his election, or at any rate on one of the leaders of the party. In early days, it was regarded as the stepping-stone to the presidency. Jefferson, Madison, Monroe, and J. Q. Adams had all served as secretaries to preceding Presidents. The conduct of foreign affairs is the chief duty of the State department: its head has therefore a larger stage to play on than any other minister, and more chances of fame. His personal importance is all the greater because the President is usually so much absorbed by questions of patronage as to be forced to leave the secretary to his own devices. Hence the foreign policy of the administration is practically that of the secretary, except so far as the latter is controlled by the Senate. The State department has also the charge of the great seal of the United States, keeps the archives, publishes the statutes, and of course instructs and controls the diplomatic and consular services.

The Secretary of the Treasury is minister of finance. His function was of the utmost importance at the beginning of the government, when a national system of finance had to be built up and the Federal government rescued from its grave embarrassments. Hamilton, who then held the office, effected both; and the work of Gallatin, who served under Jefferson, was scarcely less important. During the War of Secession, it became again powerful, owing to the enormous loans contracted and the quantities of paper money issued, and it remains so now, because it has the management (so far as Congress permits) of the currency and the national debt. The secretary has, however, by no means the same range of action as a finance minister in European countries, for as he is excluded from Congress, although he regularly reports to it, he has nothing directly to do with the imposition of taxes, and very little with the appropriation of revenue to the various burdens of the State.

The Secretary of the Interior is far from being the omnipresent power which a minister of the interior is in France or Italy, or even a home secretary in England, since nearly all

the functions which these officials discharge belong in America to the State governments or to the organs of local government. He is chiefly occupied in the management of the public lands, still of immense value, despite the lavish grants made to railway companies, and with the conduct of Indian affairs, a troublesome and unsatisfactory department, which has always been a reproach to the United States, and will apparently continue so till the Indians themselves disappear or become civilized. Patents and pensions also belong to his province, as do the national census and the geological survey.

The duties of the Secretaries of War, of the Navy, of Agriculture, and of the Postmaster-General may be gathered from their names. The Attorney-General is not only public prosecutor and standing counsel for the United States, but also to some extent what is called on the European continent a minister of justice. He has a general oversight — it can hardly be described as a control — of the Federal judicial departments, and especially of the prosecuting officers called district attorneys, and executive court officers, called United States marshals. He is the legal adviser of the President in those delicate questions, necessarily frequent under the Constitution of the United States, which arise as to the limits of the executive power and the relations of Federal to State authority, and generally in all legal matters. His opinions are frequently published officially, as a justification of the President's conduct, and an indication of the view which the executive takes of its legal position and duties in a pending matter. The attorney-general is always a lawyer of eminence, but not necessarily in the front rank of the profession, for political considerations have much to do with determining the President's choice.

The respective positions of the President and his ministers are, as has already been explained, the reverse of those which exist in the constitutional monarchies of Europe. There the sovereign is irresponsible and the minister responsible for the acts which he does in the sovereign's name. In America the President is responsible because the minister is nothing more than his servant, bound to obey him, and independent of Congress. The minister's acts are therefore legally the acts of the President. Nevertheless the minister is also responsible and liable to impeachment for offences committed in the

discharge of his duties. The question whether he is, as in England, impeachable for giving bad advice to the head of the State has never arisen, but upon the general theory of the Constitution it would rather seem that he is not, unless of course his bad counsel should amount to a conspiracy with the President to commit an impeachable offence.

So much for the ministers taken separately. It remains to consider how an American administration works as a whole, this being in Europe the most peculiar and significant feature of the parliamentary or so-called "cabinet" system.

In America the administration does not work as a whole. It is not a whole. It is a group of persons, each individually dependent on and answerable to the President, but with no joint policy, no collective responsibility.

When the Constitution was established, and George Washington chosen first President under it, it was intended that the President should be outside and above party, and the method of choosing him by electors was contrived with this very view. Washington belonged to no party, nor indeed, though diverging tendencies were already manifest, had parties yet begun to exist. There was therefore no reason why he should not select his ministers from all sections of opinion. As he was responsible to the nation and not to a majority in Congress, he was not bound to choose persons who agreed with the majority in Congress. As he, and not the ministry, was responsible for executive acts done, he had to consider, not the opinions or affiliations of his servants, but their capacity and integrity only. Washington chose as secretary of state Thomas Jefferson, already famous as the chief draftsman of the Declaration of Independence, and as attorney-general another Virginian, Edmund Randolph, both men of extreme democratic leanings, disposed to restrict the action of the Federal government within narrow limits. For secretary of the treasury he selected Alexander Hamilton of New York, and for secretary of war Henry Knox of Massachusetts. Hamilton was by far the ablest man among those who soon came to form the Federalist party, the party which called for a strong executive, and desired to subordinate the States to the central authority. He soon became recognized as its leader. Knox was of the same way of thinking. Dissensions presently arose between Jeffer-

son and Hamilton, ending in open hostility, but Washington retained them both as ministers till Jefferson retired in 1794 and Hamilton in 1795.

The second President, John Adams, kept on the ministers of his predecessors, being in accord with their opinions, for they and he belonged to the now full-grown Federalist party. But before he quitted office he had quarrelled with most of them, having taken important steps without their knowledge and against their wishes. Jefferson, the third President, was a thoroughgoing party leader, who naturally chose his ministers from his own political adherents. As all subsequent Presidents have been seated by one or other party, all have felt bound to appoint a party Cabinet. Their party expects it; and they prefer to be surrounded and advised by their own friends.

The President is personally responsible for his acts, not indeed to Congress, but to the people, by whom he is chosen. No means exist of enforcing this responsibility, except by impeachment, but as his power lasts for four years only, and is much restricted, this is no serious evil. He cannot avoid responsibility by alleging the advice of his ministers, for he need not follow it, and they are bound to obey him or retire. The ministers do not sit in Congress. They are not accountable to it, but to the President, their master. It may request their attendance before a committee, as it may require the attendance of any other witness, but they have no opportunity of expounding and justifying to Congress as a whole their own, or rather their master's, policy. Hence an adverse vote of Congress does not affect their or his position. If they propose to take a step which requires money, and Congress refuses the requisite appropriation, the step cannot be taken. But a dozen votes of censure will neither compel them to resign nor oblige the President to pause in any line of conduct which is within his constitutional rights.

This, however strange it may seem to a European, is a necessary consequence of the fact that the President, and by consequence his Cabinet, do not derive their authority from Congress. Suppose (as befel in 1878–9) a Republican President, with a Democratic majority in both Houses of Congress. The President, unless of course he is convinced that

the nation has changed its mind since it elected him, is morally bound to follow out the policy which he professed as a candidate, and which the majority of the nation must be held in electing him to have approved. That policy is, however, opposed to the views of the present majority of Congress. They are right to check him as far as they can. He is right to follow out his own views and principles in spite of them so far as the Constitution and the funds at his disposal permit. A deadlock may follow. But deadlocks may happen under any system, except that of an omnipotent sovereign, be he a man or an assembly, the risk of deadlocks being indeed the price which a nation pays for the safeguard of constitutional checks.

In this state of things one cannot properly talk of the Cabinet apart from the President. An American administration resembles not so much the Cabinets of England and France as the group of ministers who surround the Czar or the Sultan, or who executed the bidding of a Roman emperor like Constantine or Justinian. Such ministers are severally responsible to their master, and are severally called in to counsel him, but they have not necessarily any relations with one another, nor any duty of collective action. So while the President commits each department to the minister whom the law provides, and may if he chooses leave it altogether to that minister, the executive acts done are his own acts, by which the country will judge him; and still more is his policy as a whole his own policy, and not the policy of his ministers taken together. The ministers meet in council, but have comparatively little to settle when they meet, since they have no parliamentary tactics to contrive, no bills to prepare, few problems of foreign policy to discuss. They are not a government, as Europeans understand the term; they are a group of heads of departments, whom their chief, though he usually consults them separately, often finds it useful to bring together in one room for a talk about politics, or to settle some administrative question which lies on the borderland between the provinces of two ministers.

CHAPTER IX

THE SENATE

The National Legislature of the United States, called Congress, consists of two bodies, sufficiently dissimilar in composition, powers, and character to require a separate description.

The Senate consists of two persons from each State, who must be inhabitants of that State, and at least thirty years of age. They are elected by the legislature of their State for six years, and are re-eligible. One-third retire every two years, so that the whole body is renewed in a period of six years, the old members being thus at any given moment twice as numerous as the new members elected within the last two years. No senator can hold any office under the United States. The Vice-President of the Union is *ex officio* president of the Senate, but has no vote, except a casting vote when the numbers are equally divided. Failing him (if, for instance, he dies, or falls sick, or succeeds to the presidency), the Senate chooses one of its number to be president *pro tempore*. His authority in questions of order is very limited, the decision of such questions being held to belong to the Senate itself.

The functions of the Senate fall into three classes — legislative, executive, and judicial.[1] Its legislative function is to pass, along with the House of Representatives, bills which become Acts of Congress on the assent of the President, or even without his consent if passed a second time by a two-thirds majority of each House, after he has returned them for reconsideration. Its executive functions are: — (*a*) To approve or disapprove the President's nominations of Federal officers, including judges, ministers of state, and ambassadors.

[1] To avoid prolixity, I do not set forth all the details of the constitutional powers and duties of the Houses of Congress: these will be found in the text of the Constitution printed in the Appendix.

(*b*) To approve, by a majority of two-thirds of those present, of treaties made by the President — *i.e.* if less than two-thirds approve, the treaty falls to the ground. Its judicial function is to sit as a court for the trial of impeachments preferred by the House of Representatives.

The most conspicuous, and what was at one time deemed the most important feature of the Senate, is that it represents the several States of the Union as separate commonwealths, and is thus an essential part of the Federal scheme. Every State, be it as great as New York or as small as Delaware, sends two senators, no more and no less. This arrangement was long resisted by the delegates of the larger States in the Convention of 1787, and ultimately adopted because nothing less would reassure the smaller States, who feared to be overborne by the larger. It is now the provision of the Constitution most difficult to change, for "no State can be deprived of its equal suffrage in the Senate without its consent," a consent most unlikely to be given. There has never, in point of fact, been any division of interests or consequent contests between the great States and the small ones.[1]

The Senate also constitutes, as Hamilton anticipated, a link between the State governments and the National government. It is a part of the latter, but its members derive their title to sit in it from their choice by State legislatures. In one respect this connection is no unmixed benefit, for it has helped to make the national parties powerful, and their strife intense, in these last-named bodies. Every vote in the Senate is so important to the great parties that they are forced to struggle for ascendency in each of the State legislatures by whom the senators are elected. The method of choice in these bodies was formerly left to be fixed by the laws of each State, but as this gave rise to much uncertainty and intrigue, a Federal statute was passed in 1866 providing that each House of a State legislature shall first vote separately for the election of a Federal senator, and that if the choice of both Houses shall not fall on the same person, both Houses in joint meeting shall proceed to a joint vote, a majority of all the members elected to both Houses being present and voting. Even under this arrangement, a

[1] Hamilton perceived that this would be so; see his remarks in the Constitutional Convention of New York in 1788. — Elliot's *Debates*, p. 213.

senatorial election often leads to long and bitter struggles; the minority endeavouring to prevent a choice, and so keep the seat vacant.

The method of choosing the Senate by indirect election has excited the admiration of foreign critics, who have found in it a sole and sufficient cause of the excellence of the Senate as a legislative and executive authority. I shall presently inquire whether the critics are right. Meantime it is worth observing that the election of senators has in substance almost ceased to be indirect. They are still nominally chosen, as under the letter of the Constitution they must be chosen, by the State legislatures. The State legislature means, of course, the party for the time dominant, which holds a party meeting (caucus) and decides on the candidate, who is thereupon elected, the party going solid for whomsoever the majority has approved. Now the determination of the caucus has very often been arranged beforehand by the party managers. Sometimes when a vacancy in a senatorship approaches, the aspirants for it put themselves before the people of the State. Their names are discussed at the State party convention held for the nomination of party candidates for State offices, and a vote in that convention decides who shall be the party nominee for the senatorship. This vote binds the party within and without the State legislature, and at the election of members for the State legislature, which immediately precedes the occurrence of the senatorial vacancy, candidates for seats in that legislature are frequently expected to declare for which aspirant to the senatorship they will, if elected, give their votes.[1]

Sometimes the aspirant, who is of course a leading State politician, goes on the stump in the interest of those candidates for the legislature who are prepared to support him, and urges his own claims while urging theirs. I do not say that things have, in most States, gone so far as to make the choice by the legislature of some particular person as senator a foregone conclusion when the legislature has been

[1] The Constitution of the State of Nebraska (1875) allows the electors in voting for members of the State legislature to "express by ballot their preference for some person for the office of U. S. senator. The votes cast for such candidates shall be canvassed and returned in the same manner as for State officers." This is an attempt to evade and by a side wind defeat the provision of the Federal Constitution which vests the choice in the legislature.

elected. Circumstances may change; compromises may be necessary; still, it is now generally true that a reduced freedom of choice remains with the legislature. The people, or rather those wirepullers who manage the people and act in their name, have usually settled the matter at the election of the State legislature. So hard is it to make any scheme of indirect election work according to its original design; so hard is it to keep even a written and rigid Constitution from bending and warping under the actual forces of politics.

Members of the Senate vote as individuals, that is to say, the vote a senator gives is his own and not that of his State. It was otherwise in the Congress of the old Confederation before 1789. Now the two senators from a State may belong to opposite parties; and this often happens in the case of senators from States in which the two great parties are pretty equally balanced, and the majority oscillates between them.[1] As the State legislatures sit for short terms (the larger of the two houses usually for two years only), a senator has during the greater part of his six years' term to look for re-election not to the present but to a future State legislature,[2] and this circumstance tends to give him somewhat more independence.

The length of the senatorial term was one of the provisions of the Constitution which were most warmly attacked and defended in 1788. A six years' tenure, it was urged, would turn the senators into dangerous aristocrats, forgetful of the legislature which had appointed them; and some went so far as to demand that the legislature of a State should have the right to recall its senators.[3] Experience has shown that the term is by no means too long; and its length is one among the causes which have made it easier for senators than for members

[1] It was arranged from the beginning of the Federal government that the two senatorships from the same State should never be vacant at the same time.

[2] If a vacancy occurs in a senatorship at a time when the State legislature is not sitting, the executive of the State is empowered to fill it up until the next meeting of the State legislature. This power is specially important if the vacancy occurs at a time when parties are equally divided in the Senate.

[3] This was recommended by a Pennsylvanian Convention, which met after the adoption of the Constitution to suggest amendments. See Elliot's *Debates*, ii. p. 545. A State legislature sometimes passes resolutions instructing its senators to vote in a particular way, but the senators are of course in no way bound to regard such instructions.

of the House to procure re-election, — a result which, though it offends the doctrinaires of democracy, has worked well for the country. Senators from the smaller States are more frequently re-elected than those from the larger, because in the small States the competition of ambitious men is less keen, politics less changeful, the people perhaps more steadily attached to a man whom they have once honoured with their confidence. The senator from such a State generally finds it more easy to maintain his influence over his own legislature; not to add that if the State should be amenable to the power of wealth, his wealth will tell far more than it could in a large State. The average age of the Senate is less than might be expected. Three-fourths of its members are under sixty. The importance of the State he represents makes no great difference to the influence which a senator enjoys; this depends on his talents, experience, and character; and as the small State senators have often the advantage of long service and a safe seat, they are often among the most influential.

The Senate resembles the Upper Houses of Europe, and differs from those of the British colonies, and of most of the States of the Union, in being a permanent body. It is an undying body, with an existence continuous since its first creation; and though it changes, it does not change all at once, as do assemblies created by a single popular election, but undergoes an unceasing process of gradual renewal, like a lake into which streams bring fresh water to replace that which the issuing river carries out. As Harrington said of the Venetian Senate, "being always changing, it is forever the same." This provision was designed to give the Senate that permanency of composition which might qualify it to conduct or control the foreign policy of the nation. An incidental and more valuable result has been the creation of a set of traditions and a corporate spirit which have tended to form habits of dignity and self-respect. The new senators, being comparatively few, are readily assimilated; and though the balance of power shifts from one party to another according to the predominance in the State legislatures of one or other party, it shifts more slowly than in bodies directly chosen all at once, and a policy is therefore less apt to be suddenly reversed.

The legislative powers of the Senate being, except in one

point, the same as those of the House of Representatives, will be described later. That one point is a restriction as regards money bills. On the grounds that it is only by the direct representatives of the people that taxes ought to be levied, and in obvious imitation of the venerable English doctrine, which had already found a place in several State constitutions, the Constitution (Art. i. § 7) provides that "All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments, as on other bills." In practice, while the House strictly guards its right of origination, the Senate largely exerts its power of amendment, and wrangles with the House over taxes, and still more keenly over appropriations. Almost every session ends with a dispute, a conference, a compromise.

Among the rules there is none providing for a closure of debate (although an attempt to introduce such a rule was made by Henry Clay, and renewed in 1890), nor any limiting the length either of a debate or of a speech. The Senate is proud of having conducted its business without the aid of such regulations, and this has been due, not merely to the small size of the assembly, but to the sense of its dignity which has usually pervaded its members, and to the power which the opinion of the whole body has exercised on each. Where every man knows his colleagues intimately, each, if he has a character to lose, stands in awe of the others, and has so strong a sense of his own interest in maintaining the moral authority of the Chamber, that he is slow to resort to methods which might lower it in public estimation. Till recently, systematic obstruction, or, as it is called in America, "filibustering," familiar to the House, was almost unknown in the calmer air of the Senate. When it was applied some years ago by the Democratic senators to stop a bill to which they strongly objected, their conduct was not disapproved by the country, because the whole party, a minority very little smaller than the Republican majority, supported it, and people believed that nothing but some strong reason would have induced the whole party so to act. Accordingly the majority yielded.

Divisions are taken, not by separating the senators into lobbies and counting them, as in the British Parliament, but by calling the names of senators alphabetically. The Constitu-

tion provides that one-fifth of those present may demand that the Yeas and Nays be entered in the journal. Every senator answers to his name with Aye or No. He may, however, ask the leave of the Senate to abstain from voting; and if he is paired, he states, when his name is called, that he has paired with such and such another senator, and is thereupon excused.

When the Senate goes into executive session, the galleries are cleared and the doors closed; and the obligation of secrecy is supposed to be enforced by the penalty of expulsion to which a senator, disclosing confidential proceedings, makes himself liable. Practically, however, newspaper men find little difficulty in ascertaining what passes in secret session. The threatened punishment has never been inflicted, and occasions often arise when senators feel it to be desirable that the public should know what their colleagues have been doing. There has been for some time past a movement within the Senate against maintaining secrecy, particularly with regard to the confirming of nominations to office; and there is also a belief in the country that publicity would make for purity. But while some of the black sheep of the Senate love darkness because their works are evil, other members of undoubted respectability defend the present system because they think it supports the power and dignity of their body.

CHAPTER X

THE SENATE AS AN EXECUTIVE AND JUDICIAL BODY

The Senate is not only a legislative but also an executive Chamber; in fact in its early days the executive functions seem to have been thought the more important; and Hamilton went so far as to speak of the national executive authority as divided between two branches, the President and the Senate. These executive functions are two, the power of approving treaties, and that of confirming nominations to office submitted by the President.

To what has already been said regarding the functions of the President and Senate as regards treaties I need only add that the Senate, through its right of confirming or rejecting engagements with foreign powers, secures a general control over foreign policy; though it must be remembered that many of the most important acts done in this sphere (as for instance the movement of troops or ships) are purely executive acts, not falling under this control. It is in the discretion of the President whether he will communicate current negotiations to it and take its advice upon them, or will say nothing till he lays a completed treaty before it. One or other course is from time to time followed, according to the nature of the case, or the degree of friendliness existing between the President and the majority of the Senate. But in general, the President's best policy is to keep the leaders of the senatorial majority, and in particular the committee on Foreign Relations, informed of the progress of any pending negotiation. He thus feels the pulse of the Senate, which, like other assemblies, has a collective self-esteem leading it to strive for all the information and power it can secure, and while keeping it in good humour, can foresee what kind of arrangement it may be induced to sanction. The

right of going into secret session enables the whole Senate to consider despatches communicated by the President; and the more important ones, having first been submitted to the Foreign Relations committee, are thus occasionally discussed without the disadvantage of publicity. Of course no momentous secret can be long kept, even by the committee, according to the proverb in the Elder Edda — "Tell one man thy secret, but not two; if three know, the world knows."

This control of foreign policy by the Senate goes far to meet the difficulties which every free government finds in dealing with foreign Powers. If each step to be taken must be previously submitted to the governing assembly, the nation is forced to show its whole hand, and precious opportunities of winning an ally or striking a bargain may be lost. If on the other hand the executive is permitted to conduct negotiations in secret, there is always the risk, either that the assembly may disavow what has been done, a risk which makes foreign States legitimately suspicious and unwilling to negotiate, or that the nation may have to ratify, because it feels bound in honour by the act of its executive agents, arrangements which its judgment condemns. The frequent participation of the Senate in negotiations diminishes these difficulties, because it apprises the executive of what the judgment of the ratifying body is likely to be, and it commits that body by advance. The necessity of ratification by the Senate in order to give effect to a treaty, enables the country to retire from a doubtful bargain, though in a way which other Powers find disagreeable, as England did when the Senate rejected the Reverdy Johnson treaty of 1869. European statesmen may ask what becomes under such a system of the boldness and promptitude so often needed to effect a successful *coup* in foreign policy, or how a consistent attitude can be maintained if there is in the chairman of the Foreign Relations committee a sort of second foreign secretary. The answer is that America is not Europe. The problems which the Foreign Office of the United States has to deal with are far fewer and usually far simpler than those of the Old World. The Republic keeps consistently to her own side of the Atlantic; nor is it the least of the merits of the system of senatorial control that it has tended, by discouraging the executive from schemes which

may prove resultless, to diminish the taste for foreign enterprises, and to save the country from being entangled with alliances, protectorates, responsibilities of all sorts beyond its own frontiers.

The Senate may and occasionally does amend a treaty, and return it amended to the President. There is nothing to prevent it from proposing a draft treaty to him, or asking him to prepare one, but this is not the practice. For ratification a vote of two-thirds of the senators present is required. This gives great power to a vexatious minority, and increases the danger, evidenced by several incidents in the history of the Union, that the Senate or a faction in it may deal with foreign policy in a narrow, sectional, electioneering spirit. When the interest of any group of States is, or is supposed to be, against the making of a given treaty, that treaty may be defeated by the senators from those States. They tell the other senators of their own party that the prospects of the party in the district of the country whence they come will be improved if the treaty is rejected and a bold aggressive line is taken in further negotiations. Some of these senators, who care more for the party than for justice or the common interests of the country, rally to the cry, and all the more gladly if their party is opposed to the President in power, because in defeating the treaty they humiliate his administration. Thus the treaty may be rejected, and the settlement of the question at issue indefinitely postponed. It may be thought that a party acting in this vexatious way will suffer in public esteem. This happens in extreme cases; but the public are usually so indifferent to foreign affairs, and so little skilled in judging of them, that offences of the kind described may be committed with practical impunity. It is harder to fix responsibility on a body of senators than on the executive; and whereas the executive has usually an interest in settling diplomatic troubles, whose continuance it finds annoying, the Senate has no such interest, but is willing to keep them open so long as some political advantage can be sucked out of them.

Does the control of the Senate operate to prevent abuses of patronage by the President? To some extent it does, yet less completely than could be wished. When the majority belongs to the same party as the President, appointments are usually

arranged between them, with a view primarily to party interests. When the majority is opposed to the President, they are tempted to agree to his worst appointments, because such appointments discredit him and his party with the country, and become a theme of hostile comment in the next electioneering campaign. As the initiative is his, it is the nominating President, and not the confirming Senate, whom public opinion will condemn. These things being so, it may be doubted whether this executive function of the Senate is now a valuable part of the Constitution. It was designed to prevent the President from making himself a tyrant by filling the great offices with his accomplices or tools. That danger has passed away, if it ever existed; and Congress has other means of muzzling an ambitious chief magistrate. The more fully responsibility for appointments can be concentrated upon him, and the fewer the secret influences to which he is exposed, the better will his appointments be. On the other hand, it must be admitted that the participation of the Senate causes in practice less friction and delay than might have been expected from a dual control. The appointments to the Cabinet offices are confirmed as a matter of course. Those of diplomatic officers are seldom rejected. "Little tiffs" are frequent when the senatorial majority is in opposition to the executive, but the machinery, if it does not work smoothly, works well enough to carry on the ordinary business of the country, though a European observer, surprised that a democratic country allows such important business to be transacted with closed doors, is inclined to agree with the view lately advanced in the Senate that nominations ought to be discussed publicly rather than in secret executive session.

The judicial function of the Senate is to sit as a High Court for the trial of persons impeached by the House of Representatives. The senators "are on oath or affirmation," and a vote of two-thirds of those present is needed for a conviction. Of the process, as affecting the President, I have spoken in Chapter IV. It is applicable to other officials. Besides President Johnson, six persons in all have been impeached, viz.: —

Four Federal judges, of whom two were acquitted, and two convicted, one for violence and drunkenness, the other for having joined the Secessionists of 1861. Impeachment is the only means by which a Federal judge can be got rid of.

One senator, who was acquitted for want of jurisdiction, the Senate deciding that a senatorship is not a "civil office" within the meaning of Art. iii. § 4 of the Constitution.

One minister, a secretary of war, who resigned before the impeachment was actually preferred, and escaped on the ground that being a private person he was not impeachable.

Rarely as this method of proceeding has been employed, it could not be dispensed with; and it is better that the Senate should try cases in which a political element is usually present, than that the impartiality of the Supreme Court should be exposed to the criticism it would have to bear, did political questions come before it. Many senators are or have been lawyers of eminence, so that so far as legal knowledge goes they are competent members of a court.

CHAPTER XI

THE SENATE: ITS WORKING AND INFLUENCE

The Americans consider the Senate one of the successes of their Constitution, a worthy monument of the wisdom and foresight of its founders. Foreign observers have repeated this praise, and have perhaps, in their less perfect knowledge, sounded it even more loudly.

The aims with which the Senate was created, the purposes it was to fulfil, are set forth, under the form of answers to objections, in five letters (lxi.–lxv.), all by Alexander Hamilton, in the *Federalist*.[1] These aims are the five following: —

To conciliate the spirit of independence in the several States, by giving each, however small, equal representation with every other, however large, in one branch of the National government.

To create a council qualified, by its moderate size and the experience of its members, to advise and check the President in the exercise of his powers of appointing to office and concluding treaties.

To restrain the impetuosity and fickleness of the popular House, and so guard against the effects of gusts of passion or sudden changes of opinion in the people.

To provide a body of men whose greater experience, longer term of membership, and comparative independence of popular election, would make them an element of stability in the government of the nation, enabling it to maintain its character in the eyes of foreign States, and to preserve a continuity of policy at home and abroad.

To establish a Court proper for the trial of impeachments, a remedy deemed necessary to prevent abuse of power by the executive.

[1] See also Hamilton's speeches in the New York Convention. — Elliot's *Debates*, ii. p. 301 *sqq*.

All of these five objects have been more or less perfectly attained; and the Senate has acquired a position in the government which Hamilton scarcely ventured to hope for. In 1788 he wrote: "Against the force of the immediate representatives of the people nothing will be able to maintain even the constitutional authority of the Senate, but such a display of enlightened policy, and attachment to the public good, as will divide with the House of Representatives the affections and support of the entire body of the people themselves."

It may be doubted whether the Senate has excelled the House in attachment to the public good; but it has certainly shown greater capacity for managing the public business, and has won the respect, if not the affections, of the people, by its sustained intellectual power.

The *Federalist* did not think it necessary to state, nor have Americans generally realized, that this masterpiece of the Constitution-makers was in fact a happy accident. No one in the Convention of 1787 set out with the idea of such a Senate as ultimately emerged from their deliberations. It grew up under the hands of the Convention, as the result of the necessity for reconciling the conflicting demands of the large and the small States. The concession of equal representation in the Senate induced the small States to accept the principle of representation according to population in the House of Representatives; and a series of compromises between the advocates of popular power, as embodied in the House, and those of monarchical power, as embodied in the President, led to the allotment of attributes and functions which have made the Senate what it is.

When the work which they had almost unconsciously perfected was finished, the leaders of the Convention perceived its excellence, and defended it by arguments in which we feel the note of sincere conviction. Yet the conception they formed of it differed from the reality which has been evolved. Although they had created it as a branch of the legislature, they thought of it as being first and foremost a body with executive functions. And this, at first, it was. The traditions of the old Congress of the Confederation, in which the delegates of the States voted by States, the still earlier traditions of the executive councils, which advised the governors of the colonies

while still subject to the British Crown, clung about the Senate and affected the minds of the senators. It was a small body, originally of twenty-six, even in 1810 of thirty-four members only, a body not ill fitted for executive work. Its members, regarding themselves as a sort of congress of ambassadors from their respective States, were accustomed to refer for advice and instructions each to his State legislature. So late as 1828, a senator after arguing strongly against a measure declared that he would nevertheless vote for it, because he believed his State to be in its favour.[1]

For the first five years of its existence, the Senate sat with closed doors, occupying itself chiefly with the confidential business of appointments and treaties, and conferring in private with the ministers of the President. Not till 1816 did it create, in imitation of the House, those standing committees which the experience of the House had shown to be, in bodies where the executive ministers do not sit, the necessary organs for dealing with legislative business. Its present character as a legislative body, not less active and powerful than the other branch of Congress, is the result of a long process of evolution, a process possible (as will be more fully explained hereafter) even under the rigid Constitution of the United States, because the language of the sections which define the competence of the Senate is wide and general. But in gaining legislative authority, it has not lost its executive functions, although those which relate to treaties are largely exercised on the advice of the standing committee on Foreign Relations. And as respects these executive functions it stands alone in the world. No European state, no British colony, entrusts to an elective assembly that direct participation in executive business which the Senate enjoys.

What is meant by saying that the Senate has proved a success?

It has succeeded by effecting that chief object of the Fathers of the Constitution, the creation of a centre of gravity in the

[1] A similar statement was made in 1883 by a senator from Arkansas in justifying his vote for a bill he disapproved. But the fact that from early days downwards the two senators from a State might (and did) vote against one another shows that the true view of the senator is that he represents the people and not the government of his State.

government, an authority able to correct and check on the one hand the "democratic recklessness" of the House, on the other the "monarchical ambition" of the President. Placed between the two, it is necessarily the rival and often the opponent of both. The House can accomplish nothing without its concurrence. The President can be checkmated by its resistance. These are, so to speak, negative or prohibitive successes. It has achieved less in the way of positive work, whether of initiating good legislation or of improving the measures which the House sends it. But the whole scheme of the American Constitution tends to put stability above activity, to sacrifice the productive energies of the bodies it creates to their power of resisting changes in the general fabric of the government. The Senate has succeeded in making itself eminent and respected. It has drawn the best talent of the nation, so far as that talent flows to politics, into its body, has established an intellectual supremacy, has furnished a vantage ground from which men of ability may speak with authority to their fellow-citizens.

To what causes are these successes to be ascribed? Hamilton assumed that the Senate would be weaker than the House of Representatives, because it would not so directly spring from, speak for, be looked to by, the people. This was a natural view, especially as the analogy between the position of the Senate towards the House of Representatives in America, and that of the House of Lords towards the House of Commons in Great Britain, an analogy constantly present to the men of 1787, seemed to suggest that the larger and more popular Chamber must dwarf and overpower the smaller one. But the Senate has proved no less strong, and more intellectually influential, than its sister House of Congress. The analogy was unsound, because the British House of Lords is hereditary and the Senate representative. In these days no hereditary assembly, be its members ever so able, ever so wealthy, ever so socially powerful, can speak with the authority which belongs to those who speak for the people. Mirabeau's famous words in the Salle des Menus at Versailles, "We are here by the will of the people, and nothing but bayonets shall send us hence," express the whole current of modern feeling. Now the Senate, albeit not chosen by direct

popular election, does represent the people; and what it may lose through not standing in immediate contact with the masses, it gains in representing such ancient and powerful commonwealths as the States. A senator from New York or Pennsylvania speaks for, and is responsible to, millions of men.

This is the first reason for the strength of the Senate, as compared with the upper chambers of other countries. It is built on a wide and solid foundation of choice by the people and consequent responsibility to them. A second cause is to be found in its small size. A small body educates its members better than a large one, because each member has more to do, sooner masters the business not only of his committee but of the whole body, feels a livelier sense of the significance of his own action in bringing about collective action. There is less disposition to abuse the freedom of debate. Party spirit may be as intense as in great assemblies, yet it is mitigated by the wish to keep on friendly terms with those whom, however much you may dislike them, you have constantly to meet, and by the feeling of a common interest in sustaining the authority of the body. A senator soon gets to know each of his colleagues and what each of them thinks of him; he becomes sensitive to their opinions; he is less inclined to pose before them, however he may pose before the public. Thus the Senate formed, in its childhood, better habits in discussing and transacting its business than would have been formed by a large assembly; and these habits its maturer age retains.

Its comparative permanence has also worked for good. Six years, which seem a short term in Europe, are in America a long term when compared with the two years for which the House of Representatives and the Assemblies of nearly all the States are elected, long also when compared with the swiftness of change in American politics. A senator has the opportunity of thoroughly learning his work, and of proving that he has learnt it. He becomes slightly more independent of his constituency, which in America, where politicians catch at every passing breeze of opinion, is a clear gain. He is relieved a little, though only a little, of the duty of going on the stump in his State, and maintaining his influence among local politicians there.

The smallness and the permanence of the Senate have

however another important influence on its character. They contribute to one main cause of its success, the superior intellectual quality of its members. Every European who has described it, has dwelt upon the capacity of those who compose it, and most have followed Tocqueville in attributing this capacity to the method of double election. The choice of senators by the State legislature is supposed (but I think erroneously) to have proved a better means than direct choice by the people of discovering and selecting the fittest men. I have already remarked that the legislatures now do little more than register and formally complete a choice already made by the party managers, and perhaps ratified in the party convention, and am inclined to believe that direct popular election would work better. But apart from this recent development, and reviewing the whole hundred years' history of the Senate, the true explanation of its capacity is to be found in the superior attraction which it has for the ablest and most ambitious men.

A senator has more power than a member of the House, more dignity, a longer term of service, a more independent position. Hence every Federal politician aims at a senatorship, and looks on the place of representative as a stepping-stone to what may fairly be called an Upper House, because it is the House to which representatives seek to mount. It is no more surprising that the average capacity of the Senate should surpass that of the House, than that the average Cabinet minister of Europe should be abler than the average member of the legislature.

The chamber in which the Senate meets is rectangular, but the part occupied by the seats is semicircular in form, the Vice-President of the United States, who acts as presiding officer, having his chair on a marble dais, slightly raised, in the centre of the chord, with the senators all turned towards him as they sit in curving rows, each in an arm-chair, with a desk in front of it. The floor is about as large as the whole superficial area of the British House of Commons, but as there are great galleries on all four sides, running back over the lobbies, the upper part of the chamber and its total air-space much exceeds that of the English house. One of these galleries is appropriated to the President of the United States;

the others to ladies, diplomatic representatives, the press, and the public. Behind the senatorial chairs and desks there is an open space into which strangers can be brought by the senators, who sit and talk on the sofas there placed. Members of foreign legislatures are allowed access to this outer "floor of the Senate." There is, especially when the galleries are empty, a slight echo in the room, which obliges most speakers to strain their voices. Two or three pictures on the walls somewhat relieve the cold tone of the chamber, with its marble platform and sides unpierced by windows, for the light enters through glass compartments in the ceiling.

A senator always addresses the Chair "Mr. President," and refers to other senators by their States, "The senator from Ohio," "The senator from Tennessee." When two senators rise at the same moment, the Chair calls on one, indicating him by his State, "The senator from Minnesota has the floor." Senators of the Democratic party apparently always have sat on the right of the chair, Republican senators on the left; but, as already explained, the parties do not face one another. The impression which the place makes on a visitor is one of business-like gravity, a gravity which though plain is dignified. It has the air not so much of a popular assembly as of a diplomatic congress.

As might be expected from the small number of the audience, as well as from its character, discussions in the Senate are apt to be sensible and practical. Speeches are shorter and less fervid than those made in the House of Representatives, for the larger an assembly the more prone is it to declamation. The least useful debates are those on show-days, when a series of set discourses are delivered on some prominent question. Each senator brings down, and fires off in the air, a carefully prepared oration, which may have little bearing on what has gone before. In fact the speeches are made not to convince the assembly, — no one dreams of that, — but to keep a man's opinions before the public and sustain his fame. The question at issue is sure to have been already settled, either in a committee or in a "caucus" of the party which commands the majority, so that these long and sonorous harangues are mere rhetorical thunder addressed to the nation outside.

The Senate now contains many men of great wealth. Some,

an increasing number, are senators because they are rich; a few are rich because they are senators; while in the remaining cases the same talents which have won success in law or commerce have brought their possessor to the top in politics also. The great majority are or have been lawyers; some regularly practise before the Supreme Court. Complaints are occasionally levelled against the aristocratic tendencies which wealth is supposed to have bred, and sarcastic references are made to the sumptuous residences which senators have built on the new avenues of Washington. While admitting that there is more sympathy for the capitalist class among these rich men than there would be in a Senate of poor men, I must add that the Senate is far from being a class body like the Upper Houses of England or Prussia or Spain or Denmark. It is substantially representative, by its composition as well as by legal delegation, of all parts of American society; it is far too dependent, and far too sensible that it is dependent, upon public opinion, to dream of legislating in the interest of the rich.

The senators, however, indulge some social pretensions. They are the nearest approach to an official aristocracy that has yet been seen in America. They and their wives are allowed precedence at private entertainments, as well as on public occasions, over members of the House, and of course over private citizens. Jefferson might turn in his grave if he knew of such an attempt to introduce European distinctions of rank into his democracy; yet as the office is temporary, and the rank vanishes with the office, these pretensions are harmless; it is only the universal social equality of the country that makes them noteworthy. Apart from such petty advantages, the position of a senator, who can count on re-election, is the most desirable in the political world of America. It gives as much power and influence as a man need desire. It secures for him the ear of the public. It is more permanent than the presidency or a Cabinet office, requires less labour, involves less vexation, though still great vexation, by importunate office-seekers.

European writers on America have been too much inclined to idealize the Senate. Admiring its structure and function, they have assumed that the actors must be worthy of their

parts. They have been encouraged in this tendency by the language of many Americans. As the Romans were never tired of repeating that the ambassador of Pyrrhus had called the Roman senate an assembly of kings, so Americans of refinement, who are ashamed of the turbulent House of Representatives, have been wont to talk of the Senate as a sort of Olympian dwelling-place of statesmen and sages. It is nothing of the kind. It is a company of shrewd and vigorous men who have fought their way to the front by the ordinary methods of American politics, and on many of whom the battle has left its stains. There are abundant opportunities for intrigue in the Senate, because its most important business is done in the secrecy of committee rooms or of executive session; and many senators are intriguers. There are opportunities for misusing senatorial powers. Scandals have sometimes arisen from the practice of employing, as counsel before the Supreme Court, senators whose influence has contributed to the appointment or confirmation of the judges.[1] There are opportunities for corruption and blackmailing, of which unscrupulous men are well known to take advantage. Such men are fortunately few; but considering how demoralized are the legislatures of a few States, their presence must be looked for; and the rest of the Senate, however it may blush for them, is obliged to work with them and to treat them as equals. The contagion of political vice is nowhere so swiftly potent as in legislative bodies, because you cannot taboo a man who has got a vote. You may loathe him personally, but he is the people's choice, and he has a right to share in the government of the country.

As respects ability, the Senate cannot be profitably compared with the English House of Lords, because that assembly consists of some fifteen eminent and as many ordinary men attending regularly, with a multitude of undistinguished persons who rarely appear, and take no share in the deliberations. Setting the Senate beside the House of Commons, the average natural capacity of its ninety members is not above that of the ninety best men in the English House. There is

[1] In 1886, a bill was brought in forbidding members of either House of Congress to appear in the Federal courts as counsel for any railroad company or other corporation which might, in respect of its having received land grants, be affected by Federal legislation.

more variety of talent in the latter, and a greater breadth of culture. On the other hand, the Senate excels in legal knowledge as well as in practical shrewdness. The House of Commons contains more men who could give a good address on a literary or historical subject; the Senate, together with some eminent lawyers, has more who could either deliver a rousing popular harangue or manage the business of a great trading company, these being the forms of capacity commonest among congressional politicians.

The place which the Senate holds in the constitutional system of America cannot be fully appreciated till the remaining parts of that system have been described. This much, however, may be claimed for it, that it has been and is still, though less than formerly, a steadying and moderating power. One cannot say in the language of European politics that it has represented aristocratic principles, or anti-popular principles, or even conservative principles. Each of the great historic parties has in turn commanded a majority in it, and the difference between their strength has during the last decade been but slight. On none of the great issues that have divided the nation has the Senate been, for any long period, decidedly opposed to the other House of Congress. It showed no more capacity than the House for grappling with the problems of slavery extension. It was scarcely less ready than the House to strain the Constitution by supporting Lincoln in the exercise of the so-called war powers, or subsequently by cutting down presidential authority in the struggle between Congress and Andrew Johnson, though it refused to convict him when impeached by the House. All the fluctuations of public opinion tell upon it, nor does it venture, any more than the House, to confront a popular impulse, because it is, equally with the House, subject to the control of the great parties, which seek to use while they obey the dominant sentiment of the hour.

But the fluctuations of opinion tell on it less energetically than on the House of Representatives. They reach it more slowly and gradually, owing to the system which renews it by one-third every second year, so that it sometimes happens that before the tide has risen to the top of the flood in the Senate it has already begun to ebb in the country. The Senate has generally been a stouter bulwark against agitation, not merely

because a majority of the senators have always four years of membership before them, within which period public feeling may change, but also because the senators have been individually stronger men than the representatives. They have been less democratic, not in opinion, but in temper, because they were more self-confident, because they had more to lose, because experience has taught them how fleeting a thing popular sentiment is, and how useful a thing continuity in policy is. The Senate has therefore usually kept its head better than the House of Representatives. It has expressed more adequately the judgment, as contrasted with the emotion, of the nation. In this sense it has constituted a "check and balance" in the Federal government.

Of the three great functions which the Fathers of the Constitution meant it to perform, the first, that of securing the rights of the smaller States, is no longer important; while the second, that of advising or controlling the executive in appointments as well as in treaties, has given rise to evils almost commensurate with its benefits. But the third duty has been pretty fairly discharged, for "the propensity of a single and numerous assembly to yield to the impulse of sudden and violent passions" is frequently, though not invariably, restrained.

CHAPTER XII

THE HOUSE OF REPRESENTATIVES

The House of Representatives, usually called for shortness the House, represents the nation on the basis of population, as the Senate represents the States.

But even in the composition of the House the States play an important part. The Constitution provides [1] that "representatives and direct taxes shall be apportioned among the several States according to their respective numbers," and under this provision Congress allots so many members of the House to each State in proportion to its population at the last preceding decennial census, leaving the State to determine the districts within its own area for and by which the members shall be chosen. These districts are now equal or nearly equal in size; but in laying them out there is ample scope for the process called "gerrymandering," which the dominating party in a State rarely fails to apply for its own advantage. Where a State legislature has failed to redistribute the State into congressional districts, after the State has received an increase of representatives, the additional member or members are elected by the voters of the whole State on a general ticket, and are called "representatives at large." Recently one State (Maine) elected all its representatives on this plan, while another (Kansas) elected three by districts and four by general ticket. Each district, of course, lies wholly within the limits of one State. When a seat becomes vacant the governor of the State issues a writ for a new election, and when a member desires to resign his seat he does so by letter to the governor.

The original House which met in 1789 contained only sixty-five members, the idea being that there should be one member for every 30,000 persons. As population grew and new States

[1] Constitution, Art. i. § 2, par. 3; cf. Amendment xiv. § 2.

were added, the number of members was increased. Originally Congress fixed the ratio of members to population, and the House accordingly grew; but latterly, fearing a too rapid increase, it has fixed the number of members with no regard for any precise ratio of members to population. Till the election of 1892 the number was 332: it is now, under a statute of 1891, 357, being, according to the census of 1890, one member to about 174,000 souls. Seven States, Delaware, Idaho, Montana, Nevada, N. Dakota, Wyoming, and Utah have under this Act one representative each; eight have two each; while New York has thirty-four, and Pennsylvania thirty. Besides these full members there are also Territorial delegates, one from each of the Territories. These delegates sit and speak, but have no right to vote, being unrecognized by the Constitution. They are, in fact, merely persons whom the House under a statute admits to its floor and permits to address it. The quorum of the House, as of the Senate, is a majority of the whole number.

The electoral franchise on which the House is elected is for each State the same as that by which the members of the more numerous branch of the State legislature are chosen. Originally franchises varied much in different States; and this was a principal reason why the Convention of 1787 left the matter to the States to settle: now what is practically manhood suffrage prevails everywhere. A State, however, has a right of limiting the suffrage as it pleases, and many States do exclude persons convicted of crime, paupers, illiterates, etc. By the fifteenth amendment to the Constitution (passed in 1870) "the right of citizens of the United States to vote shall not be denied or abridged by any State on account of race, colour, or previous condition of servitude," while by the fourteenth amendment (passed in 1868) "the basis of representation in any State is reduced in respect of any male citizens excluded from the suffrage, save for participation in rebellion or other crimes." Each State has therefore a strong motive for keeping its suffrage wide, but the fact remains that the franchise by which the Federal legislature is chosen may differ vastly, and does in some small points actually differ in different parts of the Union.[1]

[1] Rhode Island retained till 1888 a small property qualification for electors, and in some States payment of a poll-tax is made a condition to the exercise of electoral rights.

Members are elected for two years, and the election always takes place in the even years, 1892, 1894, and so forth. Thus the election of every second Congress coincides with that of a President; and admirers of the Constitution find in this arrangement another of their favourite "checks," because while it gives the incoming President a Congress presumably, though by no means necessarily, of the same political complexion as his own, it enables the people within two years to express their approval or disapproval of his conduct by sending up another House of Representatives which may support or oppose the policy he has followed. The House does not in the regular course of things meet until a year has elapsed from the time when it has been elected, though the President may convoke it sooner, *i.e.* a House elected in November 1892 will not meet till December 1893, unless the President summons it in "extraordinary session" some time after March 1893, when the previous House expires. This summons has been issued ten times only since 1789; and has so often brought ill luck to the summoning President that a sort of superstition against it has now grown up.

The question is often mooted whether a new Congress ought not by law to meet within six months after its election, for there are inconveniences in keeping an elected House unorganized and Speakerless for a twelvemonth. But the country is not so fond of Congress as to desire more of it. It is a singular result of the present arrangement that the old House continues to sit for nearly four months after the members of the new House have been elected, and that a measure may still be pressed in the expiring Congress, against which the country has virtually pronounced at the general elections already held for its successor. In the fifty-first Congress the House voted more than 500 millions of dollars in its appropriation bills after a new Congress had been elected, and when therefore it had in strictness no longer any constituents.

The expense of an election varies greatly from district to district. Sometimes, especially in great cities where illegitimate expenditure is more frequent and less detectible than in rural districts, it rises to a sum of $10,000 or more: sometimes it is trifling. No estimate of the average can be formed, because no returns of congressional election expenses are

required by law; but as a rule a seat costs less than one for a county division does in England. A candidate, unless very wealthy, is not expected to pay the whole expense out of his own pocket, but is aided often by the local contributions of his friends, sometimes by a subvention from the election funds of the party in the State. All the official expenses, such as for clerks, polling booths, etc., are paid by the public. Although bribery is not rare, comparatively few elections are impeached, for the difficulty of proof is increased by the circumstance that the House, which is the investigating and deciding authority, does not meet till a year after the election. As a member is elected for two years only, and the investigation would probably drag on during the whole of the first session, it is scarcely worth while to dispute the return for the sake of turning him out for the second session.[1] In some States, drinking places are closed on the election day.

Among the members of the House there are few young men, and still fewer old men. The immense majority are between forty and sixty. Lawyers abound. An analysis of the House in the fiftieth Congress showed that two hundred and three members, or nearly two-thirds of the whole number, had been trained or had practised as lawyers, while in the fifty-second the number was two hundred. Of course many of these had practically dropped law as a business, and given themselves wholly to politics. Next in number come the men engaged in manufactures or commerce, in agriculture, or banking, or journalism, but no one of these occupations counted as many as forty members.[2] Ministers of religion are very rare; there were, however, two in the fifty-second Congress. No military or naval officer, and no person in the civil service of the United States, can sit. Scarcely any of the great railway men go into Congress, a fact of much significance when one considers that they are really the most powerful people in the country; and

[1] It has been recently proposed to transfer to a judicial tribunal the trial of election cases, which are now usually decided on party lines.

[2] In the fifty-second Congress the number of persons stating themselves to be engaged in commerce was 49, in agriculture 39. In the forty-eighth Congress there were 205 lawyers. I take these numbers from the *Congressional Directory*, which I have carefully analyzed, but as some members do not state their occupations, the analysis is not quite complete, and there are probably more lawyers than the number I have given.

of the numerous lawyer members very few are leaders of the bar in their respective States. The reason is the same in both cases. Residence in Washington makes practice at the bar of any of the great cities impossible, and men in lucrative practice would not generally sacrifice their profession in order to sit in the House, while railway managers or financiers are too much engrossed by their business to be able to undertake the duties of a member. The absence of railway men by no means implies the absence of railway influence, for it is as easy for a company to influence legislation from without Congress as from within.

Most members have received their early education in the common schools, but about one-half of the whole number have also graduated in a university or college. A good many, but apparently not the majority, have served in the legislature of their own State. Comparatively few are wealthy, and few are very poor, while scarcely any were at the time of their election workingmen. Of course no one could be a workingman while he sits, for he would have no time to spare for his trade, and the salary would more than meet his wants. Nothing prevents an artisan from being returned to Congress, but there seems little disposition among the working classes to send one of themselves.

A member of the House enjoys the title of Honourable, which is given to him not merely within the House (as in England), but in the world at large, as for instance in the addresses of his letters. As he shares it with members of State senates, all the higher officials, both Federal and State, and judges, the distinction is not deemed a high one.

The House has no share in the executive functions of the Senate, nothing to do with confirming appointments or approving treaties. On the other hand, it has the exclusive right of initiating revenue bills and of impeaching officials, features borrowed, through the State Constitutions, from the English House of Commons, and of choosing a President in case there should be no absolute majority of presidential electors for any one candidate. This very important power it exercised in 1801 and 1825.

Setting extraordinary sessions aside, every Congress has two sessions, distinguished as the First or Long and the Second

or Short. The long session begins in the fall of the year after the election of a Congress, and continues, with a recess at Christmas, till the July or August following. The short session begins in the December after the July adjournment, and lasts till the 4th of March following. The whole working life of a House is thus from ten to twelve months. Bills do not, as in the English Parliament, expire at the end of each session; they run on from the long session to the short one. All however that have not been passed when the fatal 4th of March arrives perish forthwith, for the session being fixed by statute cannot be extended at pleasure.[1] There is consequently a terrible scramble to get business pushed through in the last week or two of a Congress.

The House usually meets at noon, and sits till four or six o'clock, though towards the close of a session these hours are lengthened. Occasionally, when obstruction occurs, or when at the very end of a session messages are going backwards and forwards between the House, the Senate, and the President, it sits all night long.

An oath or affirmation of fidelity to the Constitution of the United States is (as prescribed by the Constitution) taken by all members;[2] also by the clerk, the sergeant-at-arms, the doorkeeper, and postmaster.

The sergeant-at-arms is the treasurer of the House, and pays to each member his salary and mileage (travelling expenses). He has the custody of the mace, and the duty of keeping order, which in extreme cases he performs by carrying the mace into a throng of disorderly members. This symbol of authority, which (as in the House of Commons) is moved from its place

[1] Senate bills also expire at the end of a Congress.

A proposal was recently made, but has not yet been adopted, to extend the session till April and have the President inaugurated then.

[2] The oath is administered by the Speaker, and in the form following: "I do solemnly swear (or affirm) that I will support the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God." "Allegiance" to a legal instrument would have seemed an odd expression to those ages in which the notion of allegiance arose; yet it fairly conveys the idea that obedience is due to the will of the people, which has taken tangible and permanent shape in the document they have enacted.

when the House goes into committee, consists of the Roman *fasces*, in ebony, bound with silver bands in the middle and at the ends, each rod ending in a spear head, at the other end a globe of silver, and on the globe a silver eagle ready for flight. English precedent suggests the mace, but as it could not be surmounted by a crown, Rome has prescribed its design.

The proceedings each day begin with prayers, which are conducted by a chaplain who is appointed by the House, and who may, of course, be selected from any religious denomination. Lots are drawn for seats at the beginning of the session, each member selecting the place he pleases according as his turn arrives. Although the Democrats are to the Speaker's right hand, members cannot, owing to the arrangement of the chairs, sit in masses palpably divided according to party, a circumstance which deprives invective of much of its dramatic effect. One cannot, as in England, point the finger of scorn at "hon. gentlemen opposite." Every member is required to remain uncovered in the House.

A member addresses the Speaker and the Speaker only, and refers to another member not by name but as the "gentleman from Pennsylvania," or, as the case may be, without any particular indication of the district which the person referred to represents. As there are twenty-eight gentlemen from Pennsylvania, and the descriptives used in the English House of Commons (learned, gallant, right honourable) are not in use, facilities for distinguishing the member intended are not perfect. A member usually speaks from his seat, but may speak from the clerk's desk or from a spot close to the Speaker's chair. A rule (often disregarded) forbids any one to pass between the Speaker and the member speaking, a curious bit of adherence to English usage.

Divisions were originally (rule of 17th April 1789) taken by going to the right and left of the chair, according to the old practice of the English House of Commons. This having been found inconvenient, a resolution of 9th June 1789 established the present practice, whereby members rise in their seats and are counted in the first instance by the Speaker, but if he is in doubt, or if a count be required by one-fifth of those present (which cannot be less than one-tenth of the whole House), then by two tellers named by the Speaker, between whom, as

they stand in the middle gangway, members pass. When a call of yeas and nays is so demanded, the clerk calls the full roll of the House, and each member answers aye or no to his name, or says "*no vote.*" When the whole roll has been called, it is called over a second time to let those vote who have not voted in the first call. Members may now change their votes. Those who have entered the House after their names were passed on the second call cannot vote, but often take the opportunity of rising to say that they would, if then present in the House, have voted for (or against) the motion. All this is set forth in the *Congressional Record*, which also contains a list of the members not voting and of the pairs.

A process which consumes so much time, for it sometimes takes an hour to call through the entire list of names, is an obvious and effective engine of obstruction. It is frequently so used, for it can be demanded not only on questions of substance, but on motions to adjourn. This is a rule which the House cannot alter, for it rests on an express provision of the Constitution, Art. i. § 5.

No one may speak more than once to the same question, unless he be the mover of the motion pending, in which case he is permitted to reply after every member choosing to speak has spoken. This rule is however frequently broken.

Speeches are limited to one hour, subject to a power to extend this time by unanimous consent, and may, in committee of the whole House, be limited to five minutes. So far as I could learn, this hour rule works very well, and does not tend to bring speeches up to that length as a regular thing. A member is at liberty to give part of his time to other members, and this is in practice constantly done. The member speaking will say: "I yield the floor to the gentleman from Ohio for five minutes," and so on. Thus a member who has once secured the floor has a large control of the debate.

The great remedy against prolix or obstructive debate is the so-called previous question, which is moved in the form, "Shall the main question be now put?" and when ordered closes forthwith all debate, and brings the House to a direct vote on that main question. On the motion for the putting of the main question no debate is allowed; but it does not destroy the right of the member "reporting the measure under con-

sideration" from a committee, to wind up the discussion by his reply. This closure of the debate may be moved by any member without the need of leave from the Speaker, and requires only a bare majority of those present. When directed by the House to be applied in committee, for it cannot be moved after the House has gone into committee, it has the effect of securing five minutes to the mover of any amendment, and five minutes to the member who first "obtains the floor" (gets the chance of speaking) in opposition to it, permitting no one else to speak. A member in proposing a resolution or motion usually asks at the same time for the previous question upon it, so as to prevent it from being talked out. Closure by previous question, first established in 1811, is in daily use, and is considered so essential to the progress of business that I never found any member or official willing to dispense with it.

Notwithstanding this powerful engine for expediting business, obstruction, or, as it is called in America, filibustering, is by no means unknown. It is usually practised by making repeated motions for the adjournment of a debate, or for "taking a recess" (suspending the sitting), or for calling the yeas and nays. Between one such motion and another some business must intervene, but as the making of a speech is "business," there is no difficulty in complying with this requirement. No speaking is permitted on these obstructive motions, yet by them time may be wasted for many continuous hours, and if the obstructing minority is a strong one, it generally succeeds, if not in defeating a measure, yet in extorting a compromise. It must be remembered that owing to the provision of the Constitution above mentioned, the House is in this matter not sovereign even over its own procedure. That rules are not adopted, as they might be, which would go further to extinguish filibustering, is due partly to this provision, partly to the notion that it is prudent to leave some means open by which a minority can make itself disagreeable, and to the belief that adequate checks exist on any gross abuse of such means.[1]

These checks are two. One is the fact that filibustering usually fails unless conducted by nearly the whole of the party

[1] In 1890 a rule was passed empowering the Speaker to refuse to put any motion which he might deem to be of dilatory nature, but the fifty-second Congress gave this power only for one class of cases.

which happens to be in a minority, and that so large a section of the House will not be at the trouble of joining in it unless upon some really serious question. Some few years ago, seventeen or eighteen members tried to obstruct systematically a measure they objected to, but their number proved insufficient, and the attempt failed. But at an earlier date, during the Reconstruction troubles which followed the war, the opposition of the solid Democratic party, then in a minority, succeeded in defeating a bill for placing five of the Southern States under military government. The other check is found in the fear of popular disapproval. If the nation sees public business stopped and necessary legislation delayed by factious obstruction, it will visit its displeasure both upon the filibustering leaders individually, and on the whole of the party compromised. However hot party spirit may be, there is always a margin of moderate men in both parties whom the unjustifiable use of legally permissible modes of opposition will alienate. Since such men can make themselves felt at the polls when the next election arrives, respect for their opinion cools the passion of congressional politicians. Thus the general feeling is that as the power of filibustering is in extreme cases a safeguard against abuses of the system of closure by "previous question," so the good sense of the community is in its turn a safeguard against abuses of the opportunities which the rules still leave open.

One subject alone, the subject of revenue, that is to say, taxation and appropriation, receives genuine discussion by the House at large. And although the power of limiting debate is often applied to expedite such business, it is seldom applied till opportunity has been given for the expression of all relevant views.

The number of bills brought into the House every year is very large, averaging over 10,000. In the thirty-seventh Congress (1861–63) the total number of bills introduced was 1026, viz.: — 613 House bills, and 433 Senate bills. In the forty-sixth it had risen to 9481, of which 7257 were House bills, 2224 Senate bills, showing that the increase has been much larger in the House than in the Senate. In the fifty-first Congress (1889–91) the number rose still further, viz. to 19,646 (including joint resolutions), of which 14,328 were introduced

in the House, 5318 in the Senate.[1] I need scarcely say that the proportion of bills that pass to bills that fail is a very small one, not one-thirtieth. As in England so even more in America, bills are lost less by direct rejection than by failing to reach their third reading, a mode of extinction which the good-nature of the House, or the unwillingness of its members to administer snubs to one another, would prefer to direct rejection, even were not the want of time a sufficient excuse to the committees for failing to report them. One is told in Washington that few bills are brought in with a view to being passed. They are presented in order to gratify some particular persons or places, and it is well understood in the House that they must not be taken seriously. Sometimes a less pardonable motive exists. The great commercial companies, and especially the railroad companies, are often through their land grants and otherwise brought into relations with the Federal government. Bills are presented in Congress which purport to withdraw some of the privileges of these companies, or to establish or favour rival enterprises, but whose real object is to levy blackmail on these wealthy bodies, since it is often cheaper for a company to buy off its enemy than to defeat him either by the illegitimate influence of the lobby, or by the strength of its case in open combat. Several great corporations have thus to maintain a permanent staff at Washington for the sake of resisting legislative attacks upon them, some merely extortionate, some intended to win local popularity.

The title and attributions of the Speaker of the House are taken from his famous English original. But the character of the office has greatly altered from that original. The note of the Speaker of the British House of Commons is his impartiality. He has indeed been chosen by a party, because a majority means in England a party. But on his way from his place on the benches to the Chair he is expected to shake off and leave behind all party ties and sympathies. Once invested with the wig and gown of office he has no longer any political opinions, and must administer exactly the same treatment to his political friends and to those who have been hitherto his opponents, to the oldest or most powerful minister and to the

[1] Of these, 2201 passed both Houses, and 2171 were approved by the President.

youngest or least popular member. His duties are limited to the enforcement of the rules and generally to the maintenance of order and decorum in debate, including the selection, when several members rise at the same moment, of the one who is to carry on the discussion. These are duties of great importance, and his position one of great dignity, but neither the duties nor the position imply political power. It makes little difference to any English party in Parliament whether the occupant of the chair has come from their own or from the hostile ranks. The Speaker can lower or raise the tone and efficiency of the House as a whole by the way he presides over it: but a custom as strong as law forbids him to render help to his own side even by private advice. Whatever information as to parliamentary law he may feel free to give must be equally at the disposal of every member.

In America the Speaker has immense political power, and is permitted, nay expected, to use it in the interests of his party. In calling upon members to speak he prefers those of his own side. He decides in their favour such points of order as are not distinctly covered by the rules. His authority over the arrangement of business is so large that he can frequently advance or postpone particular bills or motions in a way which determines their fate. A recent and much-respected Speaker went the length of intimating that he would not allow a certain bill, to which he strongly objected, to be so much as presented to the House; and this he could do by refusing to recognize the member desiring to present it.

Although the Speaker seldom delivers a speech in the House, he may and does advise the other leaders of his party privately; and when they "go into caucus" (*i.e.* hold a party meeting to determine their action on some pending question) he is present and gives counsel. He is usually the most eminent member of the party who has a seat in the House, and is really, so far as the confidential direction of its policy goes, almost its leader. His most important privilege is, however, the nomination of the numerous standing committees already referred to. In the first Congress (April 1790) the House tried the plan of appointing its committees by ballot; but this worked so ill that in January 1790 the following rule was passed: — "All committees shall be appointed by the Speaker

unless otherwise specially directed by the House." This rule has been re-adopted by each successive Congress since then. Not only does he, at the beginning of each Congress, select all the members of each of these committees, he even chooses the chairman of each, and thereby vests the direction of its business in hands approved by himself. The chairman is of course always selected from the party which commands the House, and the committee is so composed as to give that party a majority.

Since legislation and so much of the control of current administration as the House has been able to bring within its grasp, belong to these committees, their composition practically determines the action of the House on all questions of moment, and as the chairmanships of the more important committees are the posts of most influence, the disposal of them is a tremendous piece of patronage by which a Speaker can attract support to himself and his own section of the party, reward his friends, give politicians the opportunity of rising to distinction or practically extinguish their congressional career. The Speaker is, of course, far from free in disposing of these places. He has been obliged to secure his own election to the chair by promises to leading members and their friends; and while redeeming such promises, he must also regard the wishes of important groups of men or types of opinion, must compliment particular States by giving a place on good committees to their prominent representatives, must avoid nominations which could alarm particular interests. These conditions surround the exercise of his power with trouble and anxiety. Yet after all it is power, power which in the hands of a capable and ambitious man becomes so far-reaching that it is no exaggeration to call him the second, if not the first political figure in the United States, with an influence upon the fortunes of men and the course of domestic events superior, in ordinary times, to the President's, although shorter in its duration and less patent to the world.[1]

[1] "The appointment of the committees implies the distribution of work to every member. It means the determination of the cast business shall take. It decides for or against all large matters of policy, or may so decide; for while Speakers will differ from each other greatly in force of character and in the wish to give positive direction to affairs, the weakest man cannot escape from the necessity of arranging the appointments with a view to the probable

The choice of a Speaker is therefore a political event of the highest significance; and the whole policy of a Congress sometimes turns upon whether the man selected represents one or another of two divergent tendencies in the majority. Following thereon comes his distribution of members among the committees, a critical point in the history of a Congress, and one which is watched with keen interest. He devotes himself to this function for the fortnight after his installation with an intensity equalling that of a European prime minister constructing a cabinet. The parallel goes further, for as the chairmanships of the chief committees may be compared to the cabinet offices of Europe, so the Speaker is himself a great party leader as well as the president of a deliberative assembly.

Although expected to serve his party in all possible directions, he must not resort to all possible means. Both in the conduct of debate and in the formation of committees a certain measure of fairness to opponents is required from him. He must not palpably wrest the rules of the House to their disadvantage, though he may decide all doubtful points against them. He must give them a reasonable share of "the floor" (*i.e.* of debate). He must concede to them proper representation on committees.

The dignity of the Speaker's office is high. He receives $8000 a year, which is a large salary for America. In rank he stands next after the Vice-President and on a level with the justices of the Supreme Court. Washington society was once agitated by a claim of his wife to take precedence over the wives of these judges, a claim so ominous in a democratic country that efforts were made to have it adjusted without a formal decision.

character of measures which will be agitated. This, however, is far from the measure of the Speaker's power. All rules are more or less flexible. The current of precedents is never consistent or uniform. The bias of the Speaker at a critical moment will turn the scale. Mr. Randall as Speaker determined the assent of the House to the action of the Electoral Commission [of 1877]. Had he wished for a revolutionary attempt to prevent the announcement of Hayes's election, no one who has had experience in Congress, at least, will doubt that he could have forced the collision."—From an article in the New York *Nation* of April 4, 1878, by an experienced member of Congress.

CHAPTER XIII

THE HOUSE AT WORK

The room in which the House meets is in the south wing of the Capitol, the Senate and the Supreme Court being lodged in the north wing. It is more than thrice as large as the English House of Commons, with a floor about equal in area to that of Westminster Hall, 139 feet long by 93 feet wide and 36 feet high. Light is admitted through the ceiling. There are on all sides deep galleries running backwards over the lobbies, and capable of holding two thousand five hundred persons. The proportions are so good that it is not till you observe how small a man looks at the farther end, and how faint ordinary voices sound, that you realize its vast size. The seats are arranged in curved concentric rows looking towards the Speaker, whose handsome marble chair is placed on a raised marble platform projecting slightly forward into the room, the clerks and the mace below in front of him, in front of the clerks the official stenographers, to the right the seat of the sergeant-at-arms. Each member has a revolving arm-chair, with a roomy desk in front of it, where he writes and keeps his papers. Behind these chairs runs a railing, and behind the railing is an open space into which some classes of strangers may be brought, where sofas stand against the wall, and where smoking is practised, even by strangers, though the rules forbid it.

When you enter, your first impression is of noise and turmoil, a noise like that of short sharp waves in a mountain lake, fretting under a squall against a rocky shore. The raising and dropping of desk lids, the scratching of pens, the clapping of hands to call the pages, keen little boys who race along the gangways, the pattering of many feet, the hum of talking on the floor and in the galleries, make up a din over which the

Speaker with the sharp taps of his hammer, or the orators straining shrill throats, find it hard to make themselves audible. Nor is it only the noise that gives the impression of disorder. Often three or four members are on their feet at once, each shouting to catch the Speaker's attention. Others, tired of sitting still, rise to stretch themselves. Less favourable conditions for oratory cannot be imagined, and one is not surprised to be told that debate was more animated and practical in the much smaller room which the House formerly occupied.

Not only is the present room so big that only a powerful and well-trained voice can fill it, but the desks and chairs make a speaker feel as if he were addressing furniture rather than men, while of the members few seem to listen to the speeches. It is true that they sit in the House instead of running frequently out into the lobbies, but they are more occupied in talking or writing, or reading newspapers, than in attending to the debate. To attend is not easy, for only a shrill voice can overcome the murmurous roar; and one sometimes finds the newspapers in describing an unusually effective speech, observe that "Mr. So-and-So's speech drew listeners about him from all parts of the House." They could not hear him where they sat, so they left their places to crowd in the gangways near him. "Speaking in the House," says an American writer, "is like trying to address the people in the Broadway omnibuses from the curbstone in front of the Astor House. . . . Men of fine intellect and of good ordinary elocution have exclaimed in despair that in the House of Representatives the mere physical effort to be heard uses up all the powers, so that intellectual action becomes impossible. The natural refuge is in written speeches or in habitual silence, which one dreads more and more to break."

It is hard to talk calm good sense at the top of your voice, hard to unfold a complicated measure. A speaker's vocal organs react upon his manner, and his manner on the substance of his speech. It is also hard to thunder at an unscrupulous majority or a factious minority when they do not sit opposite to you, but beside you, and perhaps too much occupied with their papers to turn round and listen to you. The Americans think this an advantage, because it prevents scenes

of disorder. They may be right; but what order gains oratory loses. It is admitted that the desks encourage inattention by enabling men to write their letters; but though nearly everybody agrees that they would be better away, nobody supposes that a proposition to remove them would succeed. So too the huge galleries add to the area the voice has to fill; but the public like them, and might resent a removal to a smaller room.

There is little good speaking. I do not mean merely that fine oratory, oratory which presents valuable thoughts in eloquent words, is rare, for it is rare in all assemblies. But in the House of Representatives a set speech upon any subject of importance tends to become not an exposition or an argument but a piece of elaborate and high-flown declamation. Its author is often wise enough to send direct to the reporters what he has written out, having read aloud a small part of it in the House. When it has been printed *in extenso* in the *Congressional Record* (leave to get this done being readily obtained), he has copies struck off and distributes them among his constituents. Thus everybody is pleased and time is saved.

That there is not much good business debating, by which I mean a succession of comparatively short speeches addressed to a practical question, and hammering it out by the collision of mind with mind, arises not from any want of ability among the members, but from the unfavourable conditions under which the House acts. Most of the practical work is done in the standing committees, while most of the House's time is consumed in pointless discussions, where member after member delivers himself upon large questions not likely to be brought to a definite issue. Many of the speeches thus called forth have a value as repertories of facts, but the debate as a whole is unprofitable and languid. On the other hand the five-minute debates which take place, when the House imposes that limit of time, in committee of the Whole on the consideration of a bill reported from a standing committee, are often lively, pointed, and effective.

The topics which excite most interest and are best discussed are those of taxation and the appropriation of money, more particularly to public works, the improvement of rivers and harbours, erection of Federal buildings, and so forth. This

kind of business is indeed to most of its members the chief interest of Congress, the business which evokes the finest skill of a tactician and offers the severest temptations to a frail conscience. As a theatre or school either of political eloquence or political wisdom, the House has been inferior not only to the Senate but to most European assemblies. Nor does it enjoy much consideration at home. Its debates are very shortly reported in the Washington papers as well as in those of Philadelphia and New York. They are not widely read except in very exciting times, and do little to instruct or influence public opinion.

This is of course only one part of a legislature's functions. An assembly may despatch its business successfully and yet shine with few lights of genius. But the legislation on public matters which the House turns out is scanty in quantity and generally mediocre in quality. What is more, the House tends to avoid all really grave and pressing questions, skirmishing round them, but seldom meeting them in the face or reaching a decision which marks an advance. It is of course said in reply to such criticism, that at this moment there are few such questions lying within the competence of Congress, and that representatives must not attempt to move faster than their constituents. This latter remark is eminently true; it expresses a feeling which has gone so far that Congress conceives its duty to be to follow and not to seek to lead public opinion. The harm actually suffered so far is not grave. But the European observer cannot escape the impression that Congress might fail to grapple with a serious public danger, and is at present hardly equal to the duty of guiding and instructing the political intelligence of the nation.

Bills are frequently brought into the House proposing to effect impossible objects by absurd means, which astonish a visitor, and may even cause disquiet in other countries, while few people in America notice them, and no one thinks it worth while to expose their emptiness. The House is particularly apt to err in this way, because having no responsibility in foreign policy, and little sense of its own dignity, it applies to international affairs the habits of election meetings.

Watching the House at work, and talking to the members in the lobbies, an Englishman naturally asks himself how the

intellectual quality of the body compares with that of the House of Commons. His American friends have prepared him to expect a marked inferiority. They are fond of running down congressmen. A stranger who has taken literally all he hears is therefore surprised to find so much character, shrewdness, and keen though limited intelligence among the representatives. Their average business capacity is not below that of members of the House of Commons. True it is that great lights, such as usually adorn the British Chamber, are absent: true also that there are fewer men who have received a high education which has developed their tastes and enlarged their horizons. The want of such men seriously depresses the average. It is raised, however, by the almost total absence of two classes hitherto well represented in the British Parliament, the rich, dull parvenu, who has bought himself into public life, and the perhaps equally unlettered young sporting or fashionable man who, neither knowing nor caring anything about politics, has come in for a county or (before 1885) a small borough, on the strength of his family estates. Few congressmen sink to so low an intellectual level as these two sets of persons, for congressmen have almost certainly made their way by energy and smartness, picking up a knowledge of men and things.

I have kept to the last the feature of the House which Europeans find the strangest.

It has parties, but they are headless. There is neither Government nor Opposition; neither leaders nor whips.[1] No person holding any Federal office or receiving any Federal salary, can be a member of it. That the majority may be and often is opposed to the President and his Cabinet, does not strike Americans as odd, because they proceed on the theory that the legislative ought to be distinct from the executive authority. Since no minister sits, there is no official representative of the party which for the time being holds the reins of the executive government. Neither is there any unofficial representative. And as there are no persons whose opinions expressed in debate are followed, so there are none whose duty it is to bring up members to vote, to secure a quorum, to see that people know which way the bulk of the party is going.

[1] For definition see p. 151

So far as the majority has a chief, that chief is the Speaker, who has been chosen by them as their ablest and most influential man; but as the Speaker seldom joins in debate (though he may do so by leaving the chair, having put some one else in it), the chairman of the most important committee, that of Ways and Means, enjoys a sort of eminence, and comes nearer than any one else to the position of leader of the House. But his authority does not always enable him to secure co-operation for debate among the best speakers of his party, putting up now one now another, after the fashion of an English prime minister, and thereby guiding the general course of the discussion.

The minority do not formally choose a leader, nor is there usually any one among them whose career marks him out as practically the first man, but the person whom they have put forward as their party candidate for the Speakership, giving him what is called "the complimentary nomination," has a sort of vague claim to be so regarded. This honour amounts to very little.

How then does the House work?

Without some sort of organization, an assembly of three hundred and thirty men would be a mob, so necessity has provided in the system of committees a substitute for the European party organization. This system will be explained in the next chapter; for the present it is enough to observe that when a matter which has been (as all bills are) referred to a committee, comes up in the House to be dealt with there, the chairman of the particular committee is treated as a leader *pro hac vice*, and members who knew nothing of the matter are apt to be guided by his speech or his advice given privately. If his advice is not available, or is suspected because he belongs to the opposite party, they seek direction from the member in charge of the bill, if he belongs to their own party, or from some other member of the committee, or from some friend whom they trust. When a debate arises unexpectedly on a question of importance, members are often puzzled how to vote. The division being taken, they get some one to move a call of yeas and nays, and while this slow process goes on, they scurry about asking advice as to their action, and give their votes on the second calling over if not ready on the first.

If the issue is one of serious consequence to the party, a recess is demanded by the majority, say for two hours. The House then adjourns, each party "goes into caucus" (the Speaker possibly announcing the fact), and debates the matter with closed doors. Then the House resumes, and each party votes solid according to the determination arrived at in caucus. In spite of these expedients, surprises and scratch votes are not uncommon.

I have spoken of the din of the House of Representatives, of its air of restlessness and confusion, contrasting with the staid gravity of the Senate, of the absence of dignity both in its proceedings and in the bearing and aspect of individual members. All these things notwithstanding, there is something impressive about it, something not unworthy of the continent for which it legislates.

This huge gray hall, filled with perpetual clamour, this multitude of keen and eager faces, this ceaseless coming and going of many feet, this irreverent public, watching from the galleries and forcing its way on to the floor, all speak to the beholder's mind of the mighty democracy, destined in another century to form one-half of civilized mankind, whose affairs are here debated. If the men are not great, the interests and the issues are vast and fateful. Here, as so often in America, one thinks rather of the future than of the present. Of what tremendous struggles may not this hall become the theatre in ages yet far distant, when the parliaments of Europe have shrunk to insignificance?

CHAPTER XIV

THE COMMITTEES OF CONGRESS

When Congress first met in 1789, both Houses found themselves, as the State legislatures had theretofore been and still are, without official members and without leaders. The Senate occupied itself chiefly with executive business, and appointed no standing committees until 1816. The House however had bills to discuss, plans of taxation to frame, difficult questions of expenditure, and particularly of the national debt, to consider. For want of persons whose official duty required them, like English ministers, to run the machine by drafting schemes and bringing the raw material of its work into shape, it was forced to appoint committees. At first there were few; even in 1802 we find only five. As the numbers of the House increased and more business flowed in, additional committees were appointed; and as the House became more and more occupied by large political questions, minor matters were more and more left to be settled by these select bodies. Like all legislatures, the House constantly sought to extend its vision and its grasp, and the easiest way to do this was to provide itself with new eyes and new hands in the shape of further committees.

To avoid the tedious repetition of details, I have taken the House of Representatives and its committees for description, because the system is more fully developed there than in the Senate. But a very few words on the Senate may serve to prevent misconceptions.

There were in 1892 forty-four standing Senate committees, appointed for two years, being the period of a Congress. They and their chairmen are chosen not by the presiding officer but by the Senate itself, voting by ballot. Practically they are selected by caucuses of the majority and minority meeting in

secret conclave, and then carried wholesale by vote in the Senate. Each consists of from two to thirteen members, the most common numbers being seven and nine, and all senators sit on more than one committee, some upon four or more. The chairman is appointed by the Senate and not by the committees themselves. There are also select committees appointed for a special purpose and lasting for one session only. Every bill introduced goes after its first and second reading (which are granted as of course) to a standing committee, which examines and amends it, and reports it back to the Senate.

There were in the fifty-second Congress (May 1892) fifty standing committees of the House, *i.e.* committees appointed under standing regulations, and therefore regularly formed at the beginning of every Congress. Each committee consists of from three to sixteen members, eleven and thirteen being the commonest numbers. Every member of the House is placed on some one committee, not many on more than one. Besides these, select committees, seldom exceeding ten, on particular subjects of current interest, are appointed from time to time.

The most important standing committees are the following: —Ways and means; appropriations; elections; banking and currency; accounts; rivers and harbours; judiciary (including changes in private law as well as in courts of justice); railways and canals; foreign affairs; naval affairs; military affairs; public lands; agriculture; claims; and the several committees on the expenditures of the various departments of the administration (war, navy, etc.).

The members of every standing committee are nominated by the Speaker at the beginning of each Congress, and sit through its two sessions; those of a select committee also by the Speaker, after the committee has been ordered by the House. (Senate committees sometimes sit during the recess.) The member first named is chairman.

To some one of these standing committees each and every bill is referred. Its second as well as its first reading is granted as of course, and without debate, since there would be no time to discuss the immense number of bills presented. When read a second time it is referred under the general rules to a committee; but doubts often arise as to which is the appropriate committee, because a bill may deal with a subject

common to two or more jurisdictions, or include topics some of which belong to one jurisdiction, others to another. The disputes which may in such cases arise between several committees lead to keen debates and divisions, because the fate of the measure may depend on which of two possible paths it is made to take, since the one may bring it before a tribunal of friends, the other before a tribunal of enemies. Such disputes are determined by the vote of the House itself.

Not having been discussed, much less affirmed in principle, by the House, a bill comes before its committee with no presumption in its favour. It is one of many, and for the most a sad fate is reserved. The committee may take evidence regarding it, may hear its friends and its opponents. They usually do hear the member who has introduced it, since it seldom happens that he has himself a seat on the committee. Members who are interested approach the committee and state their case there, not in the House, because they know that the House will have neither time nor inclination to listen. The committee can amend the bill as they please, and although they cannot formally extinguish it, they can practically do so by reporting adversely, or by delaying to report it till late in the session, or by not reporting it at all.

In one or other of these ways nineteen-twentieths of the bills introduced meet their death, a death which the majority doubtless deserve, and the prospect of which tends to make members reckless as regards both the form and the substance of their proposals. A motion may be made in the House that the committee do report forthwith, and the House can of course restore the bill, when reported, to its original form. But these expedients rarely succeed, for few are the measures which excite sufficient interest to induce an impatient and over-burdened assembly to take additional work upon its own shoulders or to overrule the decision of a committee.

The deliberations of committees are usually secret. Evidence is frequently taken with open doors, but the newspapers do not report it, unless the matter excite public interest; and even the decisions arrived at are often noticed in the briefest way. It is out of order to canvass the proceedings of a committee in the House until they have been formally reported to it; and the report submitted does not usually state how the

members have voted, or contain more than a very curt outline of what has passed. No member speaking in the House is entitled to reveal anything further.

A committee have technically no right to initiate a bill, but as they can either transform one referred to them, or, if none has been referred which touches the subject they seek to deal with, can procure one to be brought in and referred to them, their command of their own province is unbounded. Hence the character of all the measures that may be passed or even considered by the House upon a particular branch of legislation depends on the composition of the committee concerned with that branch.

Some committees, such as those on naval and military affairs, and those on the expenditure of the several departments, deal with administration rather than legislation. They have power to summon the officials of the departments before them, and to interrogate them as to their methods and conduct. Authority they have none, for officials are responsible only to their chief, the President; but the power of questioning is sufficient to check if not to guide the action of a department, since imperative statutes may follow, and the department, sometimes desiring legislation and always desiring money, has strong motives for keeping on good terms with those who control legislation and the purse. It is through these committees chiefly that the executive and legislative branches of government touch one another. Yet the contact, although the most important thing in a government, is the thing which the nation least notices, and has the scantiest means of watching.

The scrutiny to which the administrative committees subject the departments is so close and constant as to occupy much of the time of the officials and seriously interfere with their duties. Not only are they often summoned to give evidence, they are required to furnish minute reports on matters which a member of Congress could ascertain for himself. Nevertheless the House committees are not certain to detect abuses or peculation, for special committees of the Senate have repeatedly unearthed dark doings which had passed unsuspected the ordeal of a House investigation.

After a bill has been debated and amended by the committee it is reported back to the House, and is taken up when that

committee is called in its order. One hour is allowed to the member whom his fellow committee-men have appointed to report. He seldom uses the whole of this hour, but allots part of it to other members, opponents as well as friends, and usually concludes by moving the previous question. This precludes subsequent amendments and leaves only an hour before the vote is taken. As on an average each committee (excluding the two or three great ones) has only two hours out of the whole ten months of Congress allotted to it to present and have discussed all its bills, it is plain that few measures can be considered, and each but shortly, in the House. The best chance of pressing one through is under the rule which permits the suspension of standing orders by a two-thirds majority during the last six days of the session.

What are the results of this system?

It destroys the unity of the House as a legislative body. Since the practical work of shaping legislation is done in the committees, the interest of members centres there, and they care less about the proceedings of the whole body. It is as a committee-man that a member does his real work. In fact the House has become not so much a legislative assembly as a huge panel from which committees are selected.

It prevents the capacity of the best members from being brought to bear upon any one piece of legislation, however important. The men of most ability and experience are chosen to be chairmen of the committees, or to sit on the two or three greatest. For other committees there remains only the rank and file of the House, a rank and file half of which is new at the beginning of each Congress. Hence every committee (except the aforesaid two or three) is composed of ordinary persons, and it is impossible, save by creating a special select committee, to get together what would be called in England "a strong committee," *i.e.* one where half or more of the members are exceptionally capable. The defect is not supplied by discussion in the House, for there is no time for such discussion.

It cramps debate. Every foreign observer has remarked how little real debate, in the European sense, takes place in the House of Representatives. The very habit of debate, the expectation of debate, the idea that debate is needed, have

vanished, except as regards questions of revenue and expenditure, because the centre of gravity has shifted from the House to the committees.

It lessens the cohesion and harmony of legislation. Each committee goes on its own way with its own bills just as though it were legislating for one planet and the other committees for others. Hence a want of policy and method in congressional action. The advance is haphazard; the parts have little relation to one another or to the whole.

It gives facilities for the exercise of underhand and even corrupt influence. In a small committee the voice of each member is well worth securing, and may be secured with little danger of a public scandal. The press cannot, even when the doors of committee rooms stand open, report the proceedings of fifty bodies; the eye of the nation cannot follow and mark what goes on within them; while the subsequent proceedings in the House are too hurried to permit a ripping up there of suspicious bargains struck in the purlieus of the Capitol, and fulfilled by votes given in a committee. I do not think that corruption, in its grosser forms, is rife at Washington. It appears chiefly in the milder form of reciprocal jobbing, or (as it is called) "log-rolling." But the arrangements of the committee system have produced and sustain the class of professional "lobbyists," men, and women too, who make it their business to "see" members and procure, by persuasion, importunity, or the use of inducements, the passing of bills, public as well as private, which involve gain to their promoters.

It reduces responsibility. In England, if a bad Act is passed or a good bill rejected, the blame falls primarily upon the ministry in power, whose command of the majority would have enabled them to defeat it, next upon the party which supported the ministry, then upon the individual members who are officially recorded to have "backed" it and voted for it in the House. The fact that a select committee recommended it — and comparatively few bills pass through a select committee — would not be held to excuse the default of the ministry and the majority. But in the United States the ministry cannot be blamed, for the Cabinet officers do not sit in Congress; the House cannot be blamed because it has only followed the decision of its committee; the committee may be

an obscure body, whose members are too insignificant to be worth blaming. The chairman is possibly a man of note, but the people have no leisure to watch fifty chairmen: they know Congress and Congress only; they cannot follow the acts of those to whom Congress chooses to delegate its functions. No discredit attaches to the dominant party, because they could not control the acts of the eleven men in the committee room. Thus public displeasure rarely finds a victim, and everybody concerned is relieved from the wholesome dread of damaging himself and his party by negligence, perversity, or dishonesty. Only when a scandal has arisen so serious as to demand investigation is the responsibility of the member to his constituents and the country brought duly home.

It lowers the interest of the nation in the proceedings of Congress. Except in exciting times, when large questions have to be settled, the bulk of real business is done not in the great hall of the House but in this labyrinth of committee rooms and the lobbies that surround them. What takes place in view of the audience is little more than a sanction, formal indeed but hurried and often heedless, of decisions procured behind the scenes, whose mode and motives remain undisclosed. Hence people cease to watch Congress with that sharp eye which every principal ought to keep fixed on his agent. Acts pass unnoticed, whose results are in a few months discovered to be so grave that the newspapers ask how it happened that they were allowed to pass.

It throws power into the hands of the chairmen of committees, especially, of course, of those which deal with finance and with great material interests. They become practically a second set of ministers, before whom the departments tremble, and who, though they can neither appoint nor dismiss a postmaster or a tide-waiter, can by legislation determine the policy of the branch of administration which they oversee. This power is not necessarily accompanied by responsibility, because it is largely exercised in secret.

It enables the House to deal with a far greater number of measures and subjects than could otherwise be overtaken; and has the advantage of enabling evidence to be taken by those whose duty it is to re-shape or amend a bill. It replaces the system of interrogating ministers in the House which prevails

in most European chambers; and enables the working of the administrative departments to be minutely scrutinized.

It sets the members of the House to work for which their previous training has fitted them much better than for either legislating or debating "in the grand style." They are shrewd, keen men of business, apt for talk in committee, less apt for wide views of policy and elevated discourse in an assembly. The committees are therefore good working bodies, but bodies which confirm congressmen in the intellectual habits they bring with them instead of raising them to the higher platform of national questions and interests.

Summing up, we may say that under this system the House despatches a vast amount of work and does the negative part of it, the killing off of worthless bills, in a thorough way. Were the committees abolished and no other organization substituted, the work could not be done. But much of it, including most of the private bills, ought not to come before Congress at all; and the more important part of what remains, viz. public legislation, is dealt with by methods which secure neither the pressing forward of the measures most needed, nor the due debate of those that are pressed forward.

Why, if these mischiefs exist, is the system of committee legislation maintained?

It is maintained because none better has been, or, as most people think, can be devised. "We have," say the Americans, "three hundred and fifty-six members in the House, most of them eager to speak, nearly all of them giving constant attendance. The bills brought in are so numerous that in our two sessions, one of seven or eight months, the other of three months, not one-twentieth could be fairly discussed on second reading or in committee of the Whole. If even this twentieth were discussed, no time would remain for supervision of the departments of State. That supervision itself must, since it involves the taking of evidence, be conducted through committees.

CHAPTER XV

CONGRESSIONAL LEGISLATION

LEGISLATION is more specifically and exclusively the business of Congress than it is the business of governing parliaments such as those of England, France, and Italy. We must therefore, in order to judge of the excellence of Congress as a working machine, examine the quality of the legislation which it turns out.

Acts of Congress are of two kinds, public and private. Passing by private acts for the present, though they occupy a large part of congressional time, let us consider public acts. These are of two kinds, those which deal with the law or its administration, and those which deal with finance, that is to say, provide for the raising and application of revenue. I devote this chapter to the former class, and the next to the latter.

There are many points of view from which one may regard the work of legislation. I suggest a few only, in respect of which the excellence of the work may be tested; and propose to ask: What security do the legislative methods and habits of Congress offer for the attainment of the following desirable objects? viz.: —

1. The excellence of the substance of a bill, *i.e.* its tendency to improve the law and promote the public welfare.
2. The excellence of the form of a bill, *i.e.* its arrangement and the scientific precision of its language.
3. The harmony and consistency of an act with the other acts of the same session.
4. The due examination and sifting in debate of a bill.
5. The publicity of a bill, *i.e.* the bringing it to the knowledge of the country at large, so that public opinion may be fully expressed regarding it.

6. The honesty and courage of the legislative assembly in rejecting a bill, however likely to be popular, which their judgment disapproves.

7. The responsibility of some person or body of persons for the enactment of a measure, *i.e.* the fixing on the right shoulders of the praise for passing a good, the blame for passing a bad, act.

The criticisms that may be passed on American practice under the preceding heads will be made clearer by a comparison of English practice. Let us therefore first see how English bills and acts stand the tests we are to apply to the work of Congress.

1. In England, as the more important bills are government bills, their policy is sure to have been carefully weighed. The ministry have every motive for care, because the fortunes of a first-class bill are their own fortunes. If it is rejected, they fall. A specially difficult bill is usually framed by a committee of the Cabinet, and then debated by the Cabinet as a whole before it appears in Parliament.

2. In England, government bills are prepared by the official government draftsmen, two eminent lawyers with several assistants, who constitute an office for this purpose.

3. The harmony of one government bill with others of the same session is secured by the care of the official draftsmen, as well as by the fact that all emanate from one and the same ministry. No such safeguards exist in the case of private members' bills, but it is of course the duty of the ministry to watch these legislative essays, and get Parliament to strike out of any one of them whatever is inconsistent with another measure passed or intended to be passed in the same session.

4. Difficult and complicated bills which raise no political controversy, after having been debated on second reading are sometimes referred to a select committee, which goes through them and reports them as amended to the House. They are afterwards considered, first in committee of the Whole, and then by the House on the stage of report from committee of the Whole to the House.

5. Except in the case of discussions at unseasonable hours, the proceedings of Parliament are so far reported in the leading newspapers and commented on by them that bills, even

those of private members, generally become known to those whom they may concern. There is usually a debate on the second reading, and this debate attracts notice.

6. A government bill is, by the law of its being, exposed to the hostile criticism of the Opposition, who have an interest in discrediting the ministry by disparaging their work. As respects private members' bills, it is the undoubted duty of some minister to watch them, and to procure their amendment or rejection if he finds them faulty. This duty is discharged less faithfully than might be wished, but perhaps as well as can be expected from weak human nature, often tempted to conciliate a supporter or an "interest" by allowing a measure to go through which ought to have been stopped.

7. Responsibility for everything done in the House rests upon the ministry of the day, because they are the leaders of the majority. If they allow a private member to pass a bad bill, if they stop him when trying to pass a good bill, they are in theory no less culpable than if they pass a bad bill of their own. Accordingly, when the second reading of a measure of consequence is moved, it is the duty of some member of the ministry to rise, with as little delay as possible, and state whether the ministry support it, or oppose it, or stand neutral. Standing neutral is, so far as responsibility to the country goes, practically the same thing as supporting.

The rules and usages I have described constitute valuable aids to legislation, and the quality of English and Scottish legislation, take it all and all, is fairly good; that is to say, the statutes are such as public opinion (whether rightly or wrongly) demands, and are well drawn for the purposes they aim at.

Let us now apply the same test to the legislation of Congress. What follows refers primarily to the House, but is largely true of the Senate, because in the Senate also the committees play an important part.

In neither House of Congress are there any government bills. All measures are brought in by private members because all members are private. The nearest approach to the government bill of England is one brought in by a leading member of the majority in pursuance of a resolution taken in the congressional caucus of that majority. This seldom hap-

pens. One must therefore compare the ordinary congressional bill with the English private member's bill rather than with a government measure, and expect to find it marked by the faults that mark the former class. The second difference is that whereas in England the criticism and amendment of a bill takes place in committee of the Whole, in the House of Representatives it takes place in a small committee of sixteen members or less, usually of eleven. In the Senate also the committees do most of the work, but the committee of the Whole occasionally debates a bill pretty fully.

Premising these dissimilarities, I go to the seven points before mentioned.

1. The excellence of the substance of a bill introduced in Congress depends entirely on the wisdom and care of its introducer. He may, if self-distrustful, take counsel with his political allies respecting it. But there is no security for its representing any opinion or knowledge but his own. It may affect the management of an executive department, but the introducing member does not command departmental information, and will, if the bill passes, have nothing to do with the carrying out of its provisions. On the other hand, the officials of the government cannot submit bills; and if they find a congressman willing to do so for them, must leave the advocacy and conduct of the measure entirely in his hands.

2. The drafting of a measure depends on the pains taken and skill exerted by its author. Senate bills are usually well drafted because many senators are experienced lawyers: House bills are often crude and obscure. There does not exist either among the executive departments or in connection with Congress, any legal office charged with the duty of preparing bills, or of seeing that the form in which they pass is technically satisfactory.

3. The only security for the consistency of the various measures of the same session is to be found in the fact that those which affect the same matter ought to be referred to the same committee. However, it often happens that there are two or more committees whose spheres of jurisdiction overlap, so that of two bills handling cognate matters, one may go to Committee A and the other to Committee B. Should different views of policy prevail in these two bodies, they may report to the House bills containing mutually repugnant provisions.

There is nothing except unusual vigilance on the part of some member interested, to prevent both bills from passing. That mischief from this cause is not serious arises from the fact that out of the multitude of bills introduced, few are reported and still fewer become law.

4. The function of a committee of either House of Congress extends not merely to the sifting and amending of the bills referred to it, but to practically re-drawing them, if the committee desires any legislation, or rejecting them by omitting to report them till near the end of the session if it thinks no legislation needed. Every committee is in fact a small bureau of legislation for the matters lying within its jurisdiction. It has for this purpose the advantage of time, of the right to take evidence, and of the fact that some of its members have been selected from their knowledge of or interest in the topics it has to deal with. On the other hand, it suffers from the non-publication of its debates, and from the tendency of all small and secret bodies to intrigues and compromises, compromises in which general principles of policy are sacrificed to personal feeling or selfish interest. Bills which go in black or white come out gray. They may lose all their distinctive colour; or they may be turned into a medley of scarcely consistent provisions. The member who has introduced a bill may not have a seat on the committee, and may therefore be unable to protect his offspring. Other members of the House, masters of the subject but not members of the committee, can only be heard as witnesses. Although therefore there are full opportunities for the discussion of the bill by the committee, it often emerges in an unsatisfactory form, or is quietly suppressed, because there is no impetus of the general opinion of the House or the public to push it through. When the bill comes back to the House the chairman or other reporting member of the committee generally moves the previous question, after which no amendment can be offered. Debate ceases and the bill is promptly passed or lost. In the Senate there is a better chance of discussion, for the Senate, having more time and fewer speakers, can review to some real purpose the findings of its committees.

5. As there is no debate on the introduction or on the second reading of a bill, the public is not necessarily apprised of the

measures which are before Congress. An important measure is of course watched by the newspapers and so becomes known: minor measures go unnoticed.

6. The general good-nature of Americans, and the tendency of members of their legislatures to oblige one another by doing reciprocal good turns, dispose people to let any bill go through which does not injure the interest of a party or of a person. Such good-nature counts for less in a committee, because a committee has its own views and gives effect to them. But in the House there are few views, though much impatience. The House has no time to weigh the merits of a bill reported back to it. Members have never heard it debated. They know no more of what passed in the committee than the report tells them. If the measure is palpably opposed to their party tenets, the majority will reject it: if no party question arises they usually adopt the view of the committee.

7. What has been said already will have shown that except as regards bills of great importance, or directly involving party issues, there can be little effective responsibility for legislation. The member who brings in a bill is not responsible, because the committee generally alters his bill. The committee is little observed and the details of what passed within the four walls of its room are not published. The great parties in the House are but faintly responsible, because their leaders are not bound to express an opinion, and a vote taken on a non-partisan bill is seldom a strict party vote. Individual members are no doubt responsible, and a member who votes against a popular measure, one for instance favoured by the workingmen, will suffer for it. But the responsibility of individuals, most of them insignificant, half of them destined to vanish, like snow-flakes in a river, at the next election, gives little security to the people.

The best defence that can be advanced for this system is that it has been naturally evolved as a means of avoiding worse mischiefs. It is really a plan for legislating by a number of commissions. Each commission, receiving suggestions in the shape of bills, taking evidence upon them, and sifting them in debate, frames its measures and lays them before the House in a shape which seems designed to make amendment in details needless, while leaving the general policy to be accepted or

rejected by a simple vote of the whole body. But the members of the commissions have no special training, no official experience, little praise or blame to look for, and no means of securing that the overburdened House will ever come to a vote on their proposals. There is no more agreement between the views of one commission and another than what may result from the fact that the majority in both belongs to the same party.

Add to the conditions above described the fact that the House in its few months of life has not time to deal with one twentieth of the many thousand bills which are thrown upon it, that it therefore drops the enormous majority unconsidered, though some of the best may be in this majority, and passes most of those which it does pass by a suspension of the rules which leaves everything to a single vote,[1] and the marvel comes to be, not that legislation is faulty, but that an intensely practical people tolerates such defective machinery. Some reasons may be suggested tending to explain this phenomenon.

Legislation is a difficult business in all free countries, and perhaps more difficult the more free the country is, because the discordant voices are more numerous and less under control. America has sometimes sacrificed practical convenience to her dislike to authority.

The Americans surpass all other nations in their power of making the best of bad conditions, getting the largest results out of scanty materials or rough methods. Many things in that country work better than they ought to work, so to speak, or could work in any other country, because the people are shrewdly alert in minimizing such mischiefs as arise from their own haste or heedlessness, and because they have a great capacity for self-help.

Aware that they possess this gift, the Americans are content to leave their political machinery unreformed. Persons who propose comprehensive reforms are suspected as theorists and crotchet-mongers. The national inventiveness, active in the spheres of mechanics and money-making, spends little of its force on the details of governmental methods.

The want of legislation on topics where legislation is needed

[1] This can be done by a two-thirds vote during the last six days of a session and on the first and third Mondays of each month.

breeds fewer evils than would follow in countries like England or France where Parliament is the only law-making body. The powers of Congress are limited to comparatively few subjects: its failures do not touch the general well-being of the people, nor the healthy administration of the ordinary law.

The faults of bills passed by the House are often cured by the Senate, where discussion is more leisurely and thorough. The committee system produces in that body also some of the same flabbiness and colourlessness in bills passed. But the blunders, whether in substance or of form, of the one Chamber are frequently corrected by the other, and many bad bills fail owing to a division of opinion between the Houses.

The President's veto kills off some vicious measures. He does not trouble himself about defects of form; but where a bill seems to him opposed to sound policy, it is his constitutional duty to disapprove it, and to throw on Congress the responsibility of passing it "over his veto" by a two-thirds vote. A good President accepts this responsibility.

CHAPTER XVI

CONGRESSIONAL FINANCE

FINANCE is a sufficiently distinct and important department of legislation to need a chapter to itself; nor does any legislature devote a larger proportion of its time than does Congress to the consideration of financial bills. These are of two kinds: those which raise revenue by taxation, and those which direct the application of the public funds to the various expenses of the government. At present Congress raises all the revenue it requires by indirect taxation,[1] and chiefly by duties of customs and excise; so taxing bills are practically tariff bills, the excise duties being comparatively little varied from year to year.

The method of passing both kinds of bills is unlike that of most European countries. In England, with which, of course, America can be most easily compared, although both the levying and spending of money are absolutely under the control of the House of Commons, the House of Commons originates no proposal for either. It never either grants money or orders the raising of money except at the request of the Crown. Once a year the chancellor of the Exchequer lays before it, together with a full statement of the revenue and expenditure of the past twelve months, estimates of the expenditure for the coming twelve months, and suggestions for the means of meeting that expenditure by taxation or by borrowing. He embodies these suggestions in resolutions on which, when the House has accepted them, bills are grounded imposing certain taxes or authorizing the raising of a loan. The House may of course amend the bills in details, but no private member ever proposes a taxing bill, for it is no concern of any one except the

[1] During the Civil War, direct taxes were levied (the proceeds of which have, however, been since returned to the States); and many other kinds of taxes besides those mentioned in the text have been imposed at different times.

ministry to fill the public treasury. The estimates prepared by the several administrative departments (Army, Navy, Office of Works, Foreign Office, etc.), and revised by the Treasury, specify the items of proposed expenditure with much particularity, and fill three or more bulky volumes, which are delivered to every member of the House. These estimates are debated in committee of the whole House, explanations being required from the ministers who represent the Treasury and the several departments, and are passed in a long succession of separate votes. Members may propose to reduce any particular grants, but not to increase them; no money is ever voted for the public service except that which the Crown has asked for through its ministers. The Crown must never ask for more than it actually needs, and hence the ministerial proposals for taxation are carefully calculated to raise just so much money as will easily cover the estimated expenses for the coming year. It is reckoned almost as great a fault in the finance minister if he has needlessly overtaxed the people, as if he has so undertaxed them as to be left with a deficit. If at the end of a year a substantial surplus appears, the taxation for next year is reduced in proportion, supposing that the expenditure remains the same. Every credit granted by Parliament expires of itself at the end of the financial year.

In the United States the secretary of the Treasury sends annually to Congress a report containing a statement of the national income and expenditure and of the condition of the public debt, together with remarks on the system of taxation and suggestions for its improvement. He also sends what is called his Annual Letter, enclosing the estimates, framed by the various departments, of the sums needed for the public services of the United States during the coming year. So far the secretary is like a European finance minister, except that he communicates with the Chamber on paper instead of making his statement and proposals orally. But here the resemblance stops. Everything that remains in the way of financial legislation is done solely by Congress and its committees, the executive having no further hand in the matter.

The business of raising money belongs to one committee only, the standing committee of Ways and Means, consisting of eleven members. Its chairman is always a leading man in

the party which commands a majority in the House. This committee prepares and reports to the House the bills needed for imposing or continuing the various customs duties, excise duties, etc. The report of the secretary has been referred by the House to this committee, but the latter does not necessarily base its bills upon or in any way regard that report. Neither does it in preparing them start from an estimate of the sums needed to support the public service. It does not, because it cannot: for it does not know what grants for the public service will be proposed by the spending committees, since the estimates submitted in the secretary's letter furnish no trustworthy basis for a guess. It does not, for the further reason that the primary object of customs duties has for many years past been not the raising of revenue but the protection of American industries by subjecting foreign products to a very high tariff.

When the revenue bills come to be debated in committee of the whole House similar causes prevent them from being scrutinized from the purely financial point of view. Debate turns on those items of the tariff which involve gain or loss to influential groups. Little inquiry is made as to the amount needed and the adaptation of the bills to produce that amount and no more. It is the same with ways and means bills in the Senate. Communications need not pass between the committees of either House and the Treasury. The person most responsible, the person who most nearly corresponds to an English chancellor of the Exchequer, or a French minister of Finance, is the chairman of the House committee of Ways and Means. But he stands in no official relation to the Treasury, and is not required to exchange a word or a letter with its staff. Neither, of course, can he count on a majority in the House. Though he is a leading man he is not a leader, *i.e.* he has no claim on the votes of his own party, many of whom may disapprove of and cause the defeat of his proposals.

The business of spending money used to belong to the committee on Appropriations, but in 1883 a new committee, that on Rivers and Harbours, received a large field of expenditure; and in 1886 sundry other supply bills were referred to sundry standing committees. The committee on Appropriations starts from, but does not adopt, the estimates sent in by the

secretary of the treasury, for the appropriation bills it prepares usually make large and often reckless reductions in these estimates. The Rivers and Harbours committee proposes grants of money for what are called "internal improvements," nominally in aid of navigation, but practically in order to turn a stream of public money into the State or States where each "improvement" is to be executed.

Every revenue bill must, of course, come before the House; and the House, whatever else it may neglect, never neglects the discussion of taxation and money grants. These are discussed as fully as the pressure of work permits, and are often added to by the insertion of fresh items, which members interested in getting money voted for a particular purpose or locality suggest. These bills then go to the Senate, which forthwith refers them to its committees. The Senate committee on Finance deals with the revenue-raising bills; the committee on Appropriations with supply bills. Both sets then come before the whole Senate. Although it cannot initiate revenue-raising bills, the Senate long ago made good its claim to amend appropriation bills, and does so freely, adding items and often raising the total of the grants. When the bills go back to the House, the House usually rejects the amendments; the Senate adheres to them, and a conference committee is appointed, consisting of three senators and three members of the House, by which a compromise is settled, hastily and in secret, and accepted, generally in the last days of the session, by a hard-pressed but reluctant House. Even as enlarged by this committee, the supply voted is often found inadequate, so a deficiency bill is introduced in the following session, including a second series of grants to the departments.

The European reader will ask how all this is or can be done by Congress without frequent communication from or to the executive government. There are such communications, for the ministers, anxious to secure appropriations adequate for their respective departments, talk to the chairmen and appear before the committees to give evidence as to departmental needs. But Congress does not look to them for guidance as in the early days it looked to Hamilton and Gallatin. If the House cuts down their estimates they turn to the Senate and beg it to restore the omitted items; if the Senate fail them,

the only resource left is a deficiency bill in the next session. If one department is so starved as to be unable to do its work, while another obtains lavish grants which invite jobbery or waste, it is the committees, not the executive, whom the people ought to blame. If, by a system of log-rolling, vast sums are wasted upon useless public works, no minister has any opportunity to interfere, any right to protest.

What I have stated may be summarized as follows: —

There is practically no connection between the policy of revenue raising and the policy of revenue spending, for these are left to different committees whose views may be opposed, and the majority in the House has no recognized leaders to remark the discrepancies or make one or other view prevail. In the forty-ninth Congress a strong free-trader was chairman of the tax-proposing committee on Ways and Means, while a strong protectionist was chairman of the spending committee on Appropriations.

There is no relation between the amount proposed to be spent in any one year and the amount proposed to be raised. But for the fact that the high tariff has, until quite recently, produced a large annual surplus, financial breakdowns must have ensued.

The knowledge and experience of the permanent officials either as regards the productivity of taxes, and the incidental benefits or losses attending their collection, or as regards the nature of various kinds of expenditure and their comparative utility, can be turned to account only by interrogating these officials before the committees. Their views are not stated in the House by a parliamentary chief, nor tested in debate by arguments addressed to him which he must there and then answer.

Little check exists on the tendency of members to deplete the public treasury by securing grants for their friends or constituents, or by putting through financial jobs for which they are to receive some private consideration. If either the majority of the committee on Appropriations or the House itself suspects a job, the grant proposed may be rejected. But it is the duty of no one in particular to scent out a job, and to defeat it by public exposure.

The nation becomes so puzzled by a financial policy varying

from year to year, and controlled by no responsible leaders, as to feel diminished interest in congressional discussions and diminished confidence in Congress.[1]

The result on the national finance is unfortunate. A thoughtful American publicist remarks: "So long as the debit side of the national account is managed by one set of men, and the credit side by another set, both sets working separately and in secret without public responsibility, and without intervention on the part of the executive official who is nominally responsible; so long as these sets, being composed largely of new men every two years, give no attention to business except when Congress is in session, and thus spend in preparing plans the whole time which ought to be spent in public discussion of plans already matured, so that an immense budget is rushed through without discussion in a week or ten days — just so long the finances will go from bad to worse, no matter by what name you call the party in power. No other nation on earth attempts such a thing, or could attempt it without soon coming to grief, our salvation thus far consisting in an enormous income, with practically no drain for military expenditures."

It may be asked how it has happened, if these defects of system exist, that the finances of America were for a long series of years so flourishing, and in particular that the public debt has been paid off with such regularity and speed that from $3,000,000,000 in 1865 it had sunk to $1,000,000,000 in 1890. Does not so brilliant a result speak of a continuously wise and skilful management of the national revenue?

The paying off of the debt seems to be due to the following causes: —

To the prosperity of the country, which, with one interval of trade depression, has for twenty-five years been developing its amazing natural resources so fast as to produce an amount of

[1] "The noteworthy fact that even the most thorough debates in Congress fail to awaken any genuine or active interest in the minds of the people has had its most striking illustrations in the course of our financial legislation, for though the discussions which have taken place in Congress upon financial questions have been so frequent, so protracted, and so thorough, engrossing a large part of the time of the House on their every recurrence, they seem in almost every instance to have made scarcely any impression upon the public mind. The Coinage Act of 1873, by which silver was demonetized, had been before the country many years ere it reached adoption, having been time and again considered by committees of Congress, time and again printed and dis-

wealth which is not only greater, but probably more widely diffused through the population, than in any other part of the world.

To the spending habits of the people, who allow themselves luxuries such as the masses enjoy in no other country, and therefore pay more than any other people in the way of indirect taxation. The fact that Federal revenue is raised by duties of customs and excise makes the people far less sensible of the pressure of taxation than they would be did they pay directly.

To the absence of the military and naval charges which press so heavily on European States.

To the maintenance of an exceedingly high tariff advocated by various powerful interests which can influence Congress. It is the acceptance of the policy of Protection, rather than any deliberate conviction that the debt ought to be paid off, that has caused the continuance of a tariff whose huge and constant surpluses have enabled the debt to be reduced.

Europeans, admiring and envying the rapidity with which the war debt has been reduced, have been disposed to credit the Americans with brilliant financial skill. That, however, which was really admirable in the conduct of the American people was not their judgment in selecting particular methods for raising money, but their readiness to submit during and immediately after the war to unprecedentedly heavy taxation. The interests (real or supposed) of the manufacturing classes have caused the maintenance of the tariff then imposed; nature, by giving the people a spending power which has rendered the tariff marvellously productive, has done the rest.

Under the system of congressional finance here described America wastes millions annually. But her wealth is so great, her revenue so elastic, that she is not sensible of the loss. She has the glorious privilege of youth, the privilege of committing errors without suffering from their consequences.

cussed in one shape or another, and having finally gained acceptance apparently by sheer persistence and importunity."—Woodrow Wilson, *Congressional Government*, p. 148 This remark, however, would not apply to the tariff debates of 1890.

CHAPTER XVII

THE RELATIONS OF THE TWO HOUSES

The creation by the Constitution of 1789 of two chambers in the United States, in place of the one chamber which existed under the Confederation, has been usually ascribed by Europeans to mere imitation of England. There were, however, better reasons to justify the division of Congress into two houses and no more; and so many indubitable instances of such a deference may be quoted that there is no need to hunt for others. Not to dwell upon the fact that there were two chambers in all but two[1] of the thirteen original States, the Convention of 1787 had two solid motives for fixing on this number, a motive of principle and theory, a motive of immediate expediency.

The chief advantage of dividing a legislature into two branches is that the one may check the haste and correct the mistakes of the other. This advantage is purchased at the price of some delay, and of the weakness which results from a splitting up of authority. If a legislature be constituted of three or more branches, the advantage is scarcely increased, the delay and weakness are immensely aggravated.

To these considerations there was added the practical ground that the division of Congress into two houses supplied a means of settling the dispute which raged between the small and the large States. The latter contended for a representation of the States in Congress proportioned to their respective populations, the former for their equal representation as sovereign commonwealths. Both were satisfied by the plan which created two chambers, in one of which the former principle, in the other of which the latter principle, was recognized. The country re-

[1] Pennsylvania and Georgia; the former of which added a Senate in 1789, the latter in 1790.

mained a federation in respect of the Senate, it became a nation in respect of the House: there was no occasion for a third chamber.

The respective characters of the two bodies are wholly unlike those of the so-called upper and lower chambers of Europe. Both equally represent the people, the whole people, and nothing but the people. The individual members come from the same classes of the community; and though there are more rich men (in proportion to numbers) in the Senate than in the House, the influence of capital is not markedly greater. Both have been formed by the same social influences: and the social pretensions of a senator expire with his term of office. Both are possessed by the same ideas, governed by the same sentiments, equally conscious of their dependence on public opinion. The one has never been, like the English House of Commons, a popular pet, the other never, like the English House of Lords, a popular bugbear.

What is perhaps stranger, the two branches of Congress have not exhibited that contrast of feeling and policy which might be expected from the different methods by which they are chosen. In the House the large States are predominant: ten out of forty-five (less than one-fourth) return an absolute majority of the representatives. In the Senate these same ten States have only twenty members out of ninety, less than a fourth of the whole. In other words, these ten States are more than sixteen times as powerful in the House as they are in the Senate. But as the House has never been the organ of the large States, nor prone to act in their interest, so neither has the Senate been the stronghold of the small States, for American politics have never turned upon an antagonism between these two sets of commonwealths. Questions relating to States' rights and the greater or less extension of the powers of the National government have played a leading part in the history of the Union. But although small States might be supposed to be specially zealous for States' rights, the tendency to uphold them has been no stronger in the Senate than in the House. In one phase of the slavery struggle the Senate happened to be under the control of the slaveholders while the House was not; and then of course the Senate championed the sovereignty of the States. But this

attitude was purely accidental, and disappeared with its transitory cause.

The real differences between the two bodies are due to the smaller size of the Senate, and the consequent greater facilities for debate, to the somewhat superior capacity of its members, to the habits which its executive functions form in individual senators, and have formed in the whole body.

In Europe, where the question as to the utility of second chambers is actively canvassed, two objections are made to them, one that they deplete the first or popular chamber of able men, the other that they induce deadlocks and consequent stoppage of the wheels of government. On both arguments light may be expected from American experience.

Although the Senate does draw off from the House many of its ablest men, it is not clear, paradoxical as the observation may appear, that the House would be much the better for retaining those men. The faults of the House are mainly due, not to want of talent among individuals, but to its defective methods, and especially to the absence of leadership. These are faults which the addition of twenty or thirty able men would not cure. Some of the committees would be stronger, and so far the work would be better done. But the House as a whole would not (assuming its rules and usages to remain what they are now) be distinctly a greater power in the country. On the other hand, the merits of the Senate are largely due to the fact that it trains to higher efficiency the ability which it has drawn from the House, and gives that ability a sphere in which it can develop with better results. Were the Senate and the House thrown into one, the country would suffer more, I think much more, by losing the Senate than it would gain by improving the House, for the united body would have the qualities of the House and not those of the Senate.

Collisions between the two Houses are frequent. Each is jealous and combative. Each is prone to alter the bills that come from the other; and the Senate in particular knocks about remorselessly those favourite children of the House, the appropriation bills. The fact that one House has passed a bill goes but a little way in inducing the other to pass it; the Senate would reject twenty House bills as readily as one. Dead-

locks, however, disagreements over serious issues which stop the machinery of administration, are not common. They rarely cause excitement or alarm outside Washington, because the country, remembering previous instances, feels sure they will be adjusted, and knows that either House would yield were it unmistakably condemned by public opinion. The executive government goes on undisturbed, and the worst that can happen is the loss of a bill which may be passed four months later. Even as between the two bodies there is no great bitterness in these conflicts, because the causes of quarrel do not lie deep. Sometimes it is self-esteem that is involved, the sensitive self-esteem of an assembly. Sometimes one or other House is playing for a party advantage. That intensity which in the similar contests of Europe arises from class feeling is absent, because there is no class distinction between the two American chambers. Thus the country seems to be watching a fencing match rather than a *combat à outrance.*

I dwell upon this substantial identity of character in the Senate and the House because it explains the fact, surprising to a European, that two perfectly co-ordinate authorities, neither of which has any more right than its rival to claim to speak for the whole nation, manage to get along together. Their quarrels are professional and personal rather than conflicts of adverse principles. The two bodies are not hostile elements in the nation, striving for supremacy, but servants of the same master, whose word of rebuke will quiet them.

The United States is the only great country in the world in which the two Houses are really equal and co-ordinate. Such a system could hardly work, and therefore could not last, if the executive were the creature of either or of both, nor unless both were in close touch with the sovereign people.

When each chamber persists in its own view, the regular proceeding is to appoint a committee of conference, consisting of three members of the Senate and three of the House. These six meet in secret, and generally settle matters by a compromise, which enables each side to retire with honour. When appropriations are involved, a sum intermediate between the smaller one which the House proposes to grant and the larger one desired by the Senate is adopted. If no compromise can be arranged, the conflict continues till one

side yields or it ends by an adjournment, which of course involves the failure of the measure disagreed upon.

In a contest the Senate usually, though not invariably, gets the better of the House. It is smaller, and can therefore more easily keep its majority together; its members are more experienced; and it has the great advantage of being permanent, whereas the House is a transient body. The Senate can hold out, because if it does not get its way at once against the House, it may do so when a new House comes up to Washington. The House cannot afford to wait, because the hour of its own dissolution is at hand. Besides, while the House does not know the Senate from inside, the Senate, many of whose members have sat in the House, knows all the "ins and outs" of its rival, can gauge its strength and play upon its weakness.

CHAPTER XVIII

GENERAL OBSERVATIONS ON CONGRESS

After this inquiry into the composition and working of each branch of Congress, it remains for me to make some observations which apply to both Houses, and which may tend to indicate the features that distinguish them from the representative assemblies of the Old World. The European reader must bear in mind three points which, in following the details of the last few chapters, he may have forgotten. The first is that Congress is not, like the Parliaments of England, France, and Italy, a sovereign assembly, but is subject to the Constitution, which only the people can change. The second is, that it neither appoints nor dismisses the executive government, which springs directly from popular election. The third is, that its sphere of legislative action is limited by the existence of forty-five governments in the several States, whose authority is just as well based as its own, and cannot be curtailed by it.

I. The choice of members of Congress is locally limited by law and by custom. Under the Constitution every representative and every senator must when elected be an inhabitant of the State whence he is elected. Moreover, State law has in many, and custom practically in all States, established that a representative must be resident in the congressional district which elects him.[1] The only exceptions to this practice occur in large cities where occasionally a man is chosen who lives in a different district of the city from that which returns

[1] The best legal authorities hold that a provision of this kind is invalid, because State law has no power to narrow the qualifications for a Federal representative prescribed by the Constitution of the United States. And Congress would probably so hold if the question arose in a case brought before it as to a disputed election. So far as I have been able to ascertain, the point has never arisen for determination.

him; but such exceptions are rare. This restriction, inconvenient as it is both to candidates, whose field of choice in seeking a constituency it narrows, and to constituencies, whom it debars from choosing persons, however eminent, who do not reside in their midst, seems to Americans so obviously reasonable that few persons, even in the best educated classes, will admit its policy to be disputable. In what are we to seek the causes of this opinion?

First. In the existence of States, orginally separate political communities, still for many purposes independent, and accustomed to consider the inhabitant of another State as almost a foreigner. A New Yorker, Pennsylvanians would say, owes allegiance to New York; he cannot feel and think as a citizen of Pennsylvania, and cannot therefore properly represent Pennsylvanian interests. This sentiment has spread by a sort of sympathy, this reasoning has been applied by a sort of analogy, to the counties, the cities, the electoral districts of the State itself. State feeling has fostered local feeling; the locality deems no man a fit representative who has not, by residence in its limits, and by making it his political home, the place where he exercises his civic rights, become soaked with its own local sentiment.

Secondly. Much of the interest felt in the proceedings of Congress relates to the raising and spending of money. Changes in the tariff may affect the industries of a locality; or a locality may petition for an appropriation of public funds to some local public work, the making of a harbour, or the improvement of the navigation of a river. In both cases it is thought that no one but an inhabitant can duly comprehend the needs or zealously advocate the demands of a neighbourhood.

Thirdly. Inasmuch as no high qualities of statesmanship are expected from a congressman, a district would think it a slur to be told that it ought to look beyond its own borders for a representative; and as the post is a paid one, the people feel that a good thing ought to be kept for one of themselves rather than thrown away on a stranger. It is by local political work, organizing, canvassing, and haranguing, that a party is kept going: and this work must be rewarded.

So far as the restriction to residents in a State is concerned

it is intelligible. The senator was originally a sort of ambassador from his State. He is chosen by the legislature or collective authority of his State. He cannot well be a citizen of one State and represent another. Even a representative in the House from one State who lived in another might be perplexed by a divided allegiance, though there are groups of States, such as those of the North-west, whose great industrial interests are substantially the same. But what reason can there be for preventing a man resident in one part of a State from representing another part, a Philadelphian, for instance, from being returned for Pittsburg, or a Bostonian for Lenox in the west of Massachusetts? In Europe it is not found that a member is less active or successful in urging the local interests of his constituency because he does not live there. He is often more successful, because more personally influential or persuasive than any resident whom the constituency could supply; and in case of a conflict of interests he always feels his efforts to be owing first to his constituents, and not to the place in which he happens to reside.

The mischief is two-fold. Inferior men are returned, because there are many parts of the country which do not grow statesmen, where nobody, or at any rate nobody desiring to enter Congress, is to be found above a moderate level of political capacity. And men of marked ability and zeal are prevented from forcing their way in. Such men are produced chiefly in the great cities of the older States. There is not room enough there for nearly all of them, but no other doors to Congress are open. Boston, New York, Philadelphia, Baltimore, could furnish six or eight times as many good members as there are seats in these cities. As such men cannot enter from their place of residence, they do not enter at all, and the nation is deprived of the benefit of their services. Careers are moreover interrupted. A promising politician may lose his seat in his own district through some fluctuation of opinion, or perhaps because he has offended the local wirepullers by too much independence. Since he cannot find a seat elsewhere he is stranded; his political life is closed, while other young men inclined to independence take warning from his fate. Changes in the State laws would not remove the evil, for the habit of choosing none but local men is rooted so deeply that it would

probably long survive the abolition of a restrictive law, and it is just as strong in States where no such law exists.

II. Every senator and representative receives a salary at present fixed at $5000 per annum, besides an allowance (called mileage) of 20 cents per mile for travelling expenses to and from Washington, and $125 for stationery. The salary is looked upon as a matter of course. It was not introduced for the sake of enabling workingmen to be returned as members, but on the general theory that all public work ought to be paid for.[1] The reasons for it are stronger than in England or France, because the distance to Washington from most parts of the United States is so great, and the attendance required there so continuous, that a man cannot attend to his profession or business while sitting in Congress. If he loses his livelihood in serving the community, the community, it is held, ought to compensate him, not to add that the class of persons whose private means put them above the need of a lucrative calling, or of compensation for interrupting it, is comparatively small even now, and hardly existed when the Constitution was framed.

III. A congressman's tenure of his place is usually short. Senators are sometimes returned for two, three, or even four successive terms by the legislatures of their States, although it may befall even the best of them to be thrown out by a change in the balance of parties, or by the intrigues of an opponent. But a member of the House can seldom feel safe in the saddle. If he is so eminent as to be necessary to his party, or if he maintains intimate relations with the leading local wirepullers of his district, he may in the Eastern and Middle, and still more in the Southern States, hold his ground for three or four Congresses, *i.e.* for six or eight years. Few do more than this. In the West a member is fortunate if he does even this. So far from its being a reason for re-electing a man that he has been a member already, it is a reason for passing him by, and giving somebody else a turn. Rotation in office, dear to the Democrats of Jefferson's school a century ago, still charms the less educated, who see in it a recognition of equality, and have

[1] Benjamin Franklin argued strongly in the Convention of 1787 against this theory, but found little support. See his remarkable speech in Mr. John Bigelow's *Life of Franklin*, vol. iii. p. 389.

no sense of the value of special knowledge or training. They like it for the same reason that the Democrats of Athens liked the choice of magistrates by lot. It is a recognition and application of equality.

An ambitious congressman is therefore forced to think day and night of his re-nomination, and to secure it not only by procuring, if he can, grants from the Federal treasury for local purposes, and places for the relatives and friends of the local wirepullers who control the nominating conventions, but also by sedulously "nursing" the constituency during the vacations. No habit could more effectually discourage noble ambition or check the growth of a class of accomplished statesmen. There are few walks of life in which experience counts for more than it does in parliamentary politics. It is an education in itself, an education in which the quick-witted Western American would make rapid progress were he suffered to remain long enough at Washington. At present he is not suffered, for nearly one-half of each successive House consists of new men, while the old members are too much harassed by the trouble of procuring their re-election to have time or motive for the serious study of political problems. This is what comes of the doctrine that a member ought to be absolutely dependent on his constituents, and of the notion that politics is neither a science, nor an art, nor even an occupation, like farming or storekeeping, in which one learns by experience, but a thing that comes by nature, and for which one man of common sense is as fit as another.

IV. The last-mentioned evil is aggravated by the short duration of a Congress. Short as it seems, the two years' term was warmly opposed, when the Constitution was framed, as being too long. The Constitutions of the several States, framed when they shook off the supremacy of the British Crown, all fixed one year, except the ultra-democratic Connecticut and Rhode Island, where under the colonial charters a legislature met every six months, and South Carolina, which had fixed two years. So essential to republicanism was this principle deemed, that the maxim "where annual elections end tyranny begins" had passed into a proverb; and the authors of the *Federalist* were obliged to argue that the limited authority of Congress, watched by the executive on one side,

and the State legislatures on the other, would prevent so long a period as two years from proving dangerous to liberty, while it was needed in order to enable the members to master the laws and understand the conditions of different parts of the Union.

At present the two years' term is justified on the ground that it furnishes a proper check on the President by interposing an election in the middle of his term. One is also told that these frequent elections are necessary to keep up popular interest in current politics, nor do some fail to hint that the temptations to jobbing would overcome the virtue of members who had a longer term before them. Where American opinion is unanimous, it would be presumptuous for a stranger to dissent. Yet the remark may be permitted that the dangers originally feared have proved chimerical. There is no country whose representatives are more dependent on popular opinion, more ready to trim their sails to the least breath of it. The public acts, the votes, and speeches of a member from Oregon or Texas can be more closely watched by his constituents than those of a Virginian member could be watched in 1789.[1] And as the frequency of elections involves inexperienced members, the efficiency of Congress suffers.

V. The numbers of the two American Houses seem small to a European when compared on the one hand with the population of the country, on the other with the practice of European States. The Senate has 90 members against the British House of Lords with about 570, and the French Senate with 300. The House has (1896) 357 against the British House of Commons with 670, and the French and Italian Chambers with 584 and 508 respectively.

The Americans, however, doubt whether both their Houses have not already become too large. They began with 26 in the Senate, 65 in the House, numbers then censured as too small, but which worked well, and gave less encouragement to idle talk and vain display than the crowded halls of to-day. The inclination of wise men is to stop further increase when the number of 400 has been reached, for they perceive that the House already suffers from disorganization, and fear that a much larger one would prove unmanageable.

[1] Of course his conduct in committee is rarely known, but I doubt whether the shortness of the term makes him more scrupulous.

VI. American congressmen are more assiduous in their attendance than the members of most European legislatures. The great majority not only remain steadily at Washington through the session, but are usually to be found in the Capitol, often in their chamber itself, while a sitting lasts. There is therefore comparatively little trouble in making the quorum of one-half,[1] except when the minority endeavours to prevent its being made, whereas in England the House of Lords, whose quorum is three, has seldom thirty peers present, and the House of Commons often finds a difficulty, especially during the dinner hour, in securing its modest quorum of forty.[2] This requirement of a high quorum, which is prescribed in the Constitution, has doubtless helped to secure a good attendance.

VII. The want of opportunities for distinction in Congress is one of the causes which make a political career unattractive to most Americans. It takes a new member at least a session to learn the procedure of the House. Full-dress debates are rare, newspaper reports of speeches delivered are curt and little read. The most serious work is done in committee; it is not known to the world, and much of it results in nothing, because many bills which a committee has considered are perhaps never even voted on by the House. A place on a good House committee is to be obtained by favour, and a high-spirited man may shrink from applying for it to the Speaker. Ability, tact, and industry make their way in the long run in Congress, as they do everywhere else. But in Congress there is, for most men, no long run. Only very strong local influence, or some remarkable party service rendered, will enable a member to keep his seat through two or three successive Congresses. Nowhere therefore does the zeal of a young politician sooner wax cold than in the House of Representatives. Unfruitful toil, the toil of turning a crank which does nothing but register its own turnings, or of writing contributions which an editor steadily rejects, is of all things the most disheartening. It is more disheartening than the non-requital of merit; for that at least spares the self-respect of the sufferer.

[1] Though sometimes the sergeant-at-arms is sent round Washington with a carriage to fetch members down from their residences to the Capitol.

[2] Oliver Cromwell's House of 360 members, including 30 from Scotland and 30 from Ireland, had a quorum of 60.

Now toil for the public is usually unfruitful in the House of Representatives, indeed in all Houses. But toil for the pecuniary interests of one's constituents and friends is fruitful, for it obliges people, it wins the reputation of energy and smartness, it has the promise not only of a re-nomination, but of that possible seat in the Senate which is the highest ambition of the congressman. Power, fame, perhaps even riches, sit upon that pinnacle. But the thin-spun life is usually slit before the fair guerdon has been found. Few young men of high gifts and fine tastes look forward to entering public life, for the probable disappointments and vexations of a life in Congress so far outweigh its attractions that nothing but a strong sense of public duty suffices to draw such men into it. Law, education, literature, the higher walks of commerce, finance, or railway work, offer a better prospect of usefulness, enjoyment, or distinction.

The country does not go to Congress to look for its presidential candidates as England looks to Parliament for its prime ministers. The opportunities by which a man can win distinction there are few. He does not make himself familiar to the eye and ear of the people. Congress, in short, is not a focus of political life as are the legislatures of France, Italy, and England. Though it has become more powerful against the several States than it was formerly, though it has extended its arms in every direction, and encroached upon the executive, it has not become more interesting to the people, nor strengthened its hold on their respect and affection.

VIII. Neither in the Senate nor in the House are there any recognized leaders. There is no ministry, no ex-ministry leading an opposition, no chieftains at the head of definite groups who follow their lead, as the Irish Nationalist members in the British Parliament followed Mr. Parnell, and a large section in the French and German Chambers followed M. Clemenceau and Dr. Windthorst. Hence there exists no regular working agency for securing either that members shall be apprised of the divisions to be expected, or that they shall vote in those divisions in a particular way.

To any one familiar with the methods of the English Parliament this seems incomprehensible. How, he asks, can business go on at all, how can each party make itself felt as a party with neither leader nor whips.

Each party in the House of Commons has, besides its leaders, a member of the House nominated by the chief leader as his aide-de-camp, and called the whipper-in, or, for shortness, the whip. The whip's duties are (1) to inform every member belonging to the party when an important division may be expected, and if he sees the member in or about the House, to keep him there until the division is called; (2) to direct the members of his own party how to vote; (3) to obtain pairs for them if they cannot be present to vote; (4) to "tell," *i.e.* count the members in every party division; (5) to "keep touch" of opinion within the party, and convey to the leader a faithful impression of that opinion, from which the latter can judge how far he may count on the support of his whole party in any course he proposes to take. Without the constant presence and activity of the ministerial whip the wheels of government could not go on for a day, because the ministry would be exposed to the risk of casual defeats which would destroy their credit and might involve their resignation. Similarly the Opposition, and any third or fourth party, find it necessary to have their whip or whips, because it is only thus that they can act as a party, guide their supporters, and bring their full strength to bear on a division.

The answer to this question is threefold. Whips are not so necessary at Washington as at Westminster. A sort of substitute for them has been devised. Congress does to some extent suffer from the inadequacy of the substituted device.

A division in Congress has not the importance it has in the House of Commons. There it may throw out the ministry. In Congress it never does more than affirm or negative some particular bill or resolution. Even a division in the Senate, which involves the rejection of a treaty or of an appointment to some great office, does not disturb the tenure of the executive. Hence it is not essential to the majority that its full strength should be always at hand, nor has a minority party any great prize set before it as the result of a successful vote.

Questions, however, arise in which some large party interest is involved. There may be a bill by which the party means to carry out its main views of policy or perhaps to curry favour with the people, or a resolution whereby it hopes to damage a hostile executive. In such cases it is important to bring up

every vote. Accordingly at the beginning of every Congress a caucus committee is elected by the majority, and it becomes the duty of the chairman and secretary of this committee (to whom, in the case of a party bill supported by the majority, there is added the chairman of the committee to which that bill has been referred, necessarily a member of the majority) to act as whips, *i.e.* to give notice of important divisions by sending out a "call" to members of the party, and to take all requisite steps to have a quorum and a majority present to push through the bill or resolution to which the party stands committed. *Mutatis mutandis* (for of course it is seldom an object with the minority to secure a quorum), the minority take the same course to bring up their men on important divisions.

In cases of gravity or doubt, where it is thought prudent to consult or to re-stimulate the party, the caucus committee convokes a caucus, *i.e.* a meeting of the whole party, at which the attitude to be assumed by the party is debated with closed doors, and a vote taken as to the course to be adopted. By this vote every member of the party is deemed bound, just as he would be in England by the request of the leader conveyed through the whip. Disobedience cannot be punished in Congress itself, except of course by social penalties; but it endangers the seat of the too independent member, for the party managers at Washington will communicate with the party managers in his district, and the latter will probably refuse to re-nominate him at the next election. The most important caucus of a Congress is that held at the opening to select the party candidate for the speakership, selection by the majority being of course equivalent to election. As the views and tendencies of the Speaker determine the composition of the committees, and thereby the course of legislation, his selection is a matter of supreme importance, and is preceded by weeks of intrigue and canvassing.

The process of "going into caucus" is the regular American substitute for recognized leadership, and has the advantage of seeming more consistent with democratic equality, because every member of the party has in theory equal weight in the party meeting. It is used whenever a line of policy has to be settled, or the whole party to be rallied for a particular party division. But of course it cannot be employed every day or for every bill. Hence when no party meeting has issued its

orders, a member is comparatively free to vote as he pleases, or rather as he thinks his constituents please.

The congressional caucus has in troublous times to be supplemented by something like obedience to regular leaders. Mr. Thaddeus Stevens, for instance, led with recognized authority the majority of the House in its struggle with President Andrew Johnson. The Senate is rather more jealous of the equality of all its members. No senator can be said to have any authority beyond that of exceptional talent and experience; and of course a senatorial caucus, since it rarely consists of more than fifty persons, is a better working body than a House caucus, which may exceed two hundred.[1]

For the purpose of serious party issues the House of Representatives is fully as much a party body as the House of Commons. A member voting against his party on such an issue is more certain to forfeit his party reputation and his seat than is an English member. But for the purpose of ordinary questions, of issues not involving party fortunes, a representative is less bound by party ties than an English member, because he has neither leaders to guide him by their speeches nor whips by their private instructions. The apparent gain is that a wider field is left for independent judgment on non-partisan questions. The real loss is that legislation becomes weak and inconsistent. This conclusion is not encouraging to those who expect us to get rid of party in our legislatures. A deliberative assembly is, after all, only a crowd of men; and the more intelligent a crowd is, so much the more numerous are its volitions; so much greater the difficulty of agreement. Like other crowds, a legislature must be led and ruled. Its merit lies not in the independence of its members, but in the reflex action of its opinion upon the leaders, in its willingness to defer to them in minor matters, reserving disobedience for the issues in which some great principle overrides both the obligation of deference to established authority and the respect due to special knowledge.

[1] At one time the congressional caucus played in American history a great part which it has now renounced. From 1800 till 1824 party meetings of senators and representatives were held which nominated the party candidates for the presidency, who were then accepted by each party as its regular candidates. In 1828 the State legislatures made these nominations, and in 1832 the present system of national conventions was introduced.

The spirit of party may seem to be weaker in Congress than in the people at large. But this is only because the questions which the people decide at the polls are always questions of choice between candidates for office. These are definite questions, questions eminently of a party character, because candidates represent in the America of to-day not principles but parties. Whenever a vote upon persons occurs in Congress, Congress gives a strict party vote. Were the people to vote at the polls on matters not explicitly comprised within a party platform, there would be the same uncertainty as Congress displays. The habit of joint action which makes the life of a party is equally intense in every part of the American system. But in England the existence of a Ministry and Opposition in Parliament sweeps within the circle of party action many topics which in America are left outside, and therefore Congress seems, but is not, less permeated than Parliament by party spirit.

CHAPTER XIX

THE RELATIONS OF CONGRESS TO THE PRESIDENT

So far as they are legislative bodies, the House and the Senate have similar powers and stand in the same relation to the executive. We may therefore discuss them together, or rather the reader may assume that whatever is said of the House as a legislature applies to the Senate.

Although the Constitution forbids any Federal official to be a member of either the House or the Senate, there is nothing in it to prevent officials from speaking there; as indeed there is nothing to prevent either House from assigning places and the right to speak to any one whom it chooses. In the early days Washington came down and delivered his opening speech. Occasionally he remained in the Senate during a debate, and even expressed his opinion there. When Hamilton, the first secretary of the treasury, prepared his famous report on the National finances, he asked the House whether they would hear him speak it, or would receive it in writing. They chose the latter course, and the precedent then set has been followed by subsequent ministers, while that set in 1801 by President Jefferson when he transmitted his message in writing instead of delivering a speech, has been similarly respected by all his successors.

Thus neither House now hears a member of the executive; and when a minister appears before a committee, he appears only as a witness to answer questions, not to state and argue his own case. There is therefore little direct intercourse between Congress and the administration, and no sense of interdependence and community of action such as exists in other parliamentary countries.[1] Be it remembered also that a min-

[1] The House some years ago passed a bill for transferring Indian affairs from the secretary of the interior to the secretary of war without consulting either official.

ister may never have sat in Congress, and may therefore be ignorant of its temper and habits. Six members of Mr. Cleveland's Cabinet, in 1888, had never had a seat in either House. The President himself, although he has been voted into office by his party, is not necessarily its leader, nor even one among its most prominent leaders. Hence he does not sway the councils and guide the policy of those members of Congress who belong to his own side. No duty lies on Congress to take up a subject to which he has called attention as needing legislation; and the suggestions which he makes, year after year, are in fact frequently neglected, even when his party has a majority in both Houses, or when the subject lies outside party lines.

The President and his Cabinet have no recognized spokesman in either House. A particular senator or representative may be in confidential communication with them, and be the instrument through whom they seek to act; but he would probably disavow rather than claim the position of an exponent of ministerial wishes. The President can of course influence members of Congress through patronage. He may give places to them or their friends; he may approve or veto bills in which they are interested; his ministers may allot lucrative contracts to their nominees. This power is considerable, but covert, for the knowledge that it was being used might damage the member in public estimation and expose the executive to imputations.

The consequence of cutting off open relations has been to encourage secret influence, which may no doubt be used for legitimate purposes, but which, being exerted in darkness, is seldom above suspicion. When the President or a minister is attacked in Congress, it is not the duty of any one there to justify his conduct. The accused official may send a written defence or may induce a member to state his case; but this method lacks the advantages of the European parliamentary system, under which the person assailed repels in debate the various charges, showing himself not afraid to answer fresh questions and grapple with new points. Thus by its exclusion from Congress the executive is deprived of the power of leading and guiding the legislature and of justifying in debate its administrative acts.

Next as to the power of Congress over the executive. Either

House of Congress, or both Houses jointly, can pass resolutions calling on the President or his ministers to take certain steps, or disapproving steps they have already taken. The President need not obey such resolutions, need not even notice them. They do not shorten his term or limit his discretion. Moreover, if the resolution be one censuring the act of a minister, the President does not escape responsibility by throwing over the minister, because the law makes him, and not his servant or adviser, responsible.

Either House of Congress can direct a committee to summon and examine a minister, who, though he might legally refuse to attend, never does refuse. The committee, when it has got him, can do nothing more than question him. He may evade their questions, may put them off the scent by dexterous concealments. He may with impunity tell them that he means to take his own course. To his own master, the President, he standeth or falleth.

Congress may refuse to the President the legislation he requests, and thus, by mortifying and embarrassing him, may seek to compel his compliance with its wishes. It is only a timid President, or a President greatly bent on accomplishing some end for which legislation is needed, who will be moved by such tactics.

Congress can pass bills requiring the President or any minister to do or abstain from doing certain acts of a kind hitherto left to his free will and judgment, may, in fact, endeavour to tie down the officials by prescribing certain conduct for them in great detail. The President will presumably veto such bills, as contrary to sound administrative policy. If, however, he signs them, or if Congress passes them over his veto, the further question may arise whether they are within the constitutional powers of Congress, or are invalid as unduly trenching on the discretion which the Constitution leaves to the executive chief magistrate. If he (or a minister), alleging them to be unconstitutional, disobeys them, the only means of deciding whether he is right is by getting the point before the Supreme Court as an issue of law in some legal proceeding. This cannot always be done. If it is done, and the court decide against the President, then if he still refuses to obey, nothing remains but to impeach him.

Impeachment, of which an account has already been given, is the heaviest piece of artillery in the congressional arsenal, but because it is so heavy it is unfit for ordinary use. It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at. Although the one President (Andrew Johnson) against whom it has been used had for two years constantly, and with great intemperance of language, so defied and resisted Congress that the whole machinery of government had been severely strained, yet the Senate did not convict him, because no single offence had been clearly made out. Thus impeachment does not tend to secure, and indeed was never meant to secure, the co-operation of the executive with Congress.

It accordingly appears that Congress cannot compel the dismissal of any official. It may investigate his conduct by a committee and so try to drive him to resign. It may request the President to dismiss him, but if his master stands by him and he sticks to his place, nothing more can be done. He may of course be impeached, but one does not impeach for mere incompetence or laxity, as one does not use steam hammers to crack nuts. Thus we arrive at the result that while Congress may examine the servants of the public to any extent, may censure them, may lay down rules for their guidance, it cannot get rid of them. It is as if the directors of a company were forced to go on employing a manager whom they had ceased to trust, because it was not they but the shareholders who had appointed him.

There remains the power which in free countries has been long regarded as the citadel of parliamentary supremacy, the power of the purse. The Constitution keeps the President far from this citadel, granting to Congress the sole right of raising money and appropriating it to the service of the State. Its management of National finance is significantly illustrative of the plan which separates the legislative from the executive. In this supremely important matter, the administration, instead of proposing and supervising, instead of securing that each department gets the money that it needs, that no money goes where it is not needed, that revenue is procured in the least troublesome and expensive way, that an exact yearly balance

is struck, that the policy of expenditure is self-consistent and reasonably permanent from year to year, is by its exclusion from Congress deprived of influence on the one hand, of responsibility on the other.

The office of finance minister is put into commission, and divided between the chairmen of several unconnected committees of both Houses. A mass of business which specially needs the knowledge, skill, and economical conscience of a responsible ministry, is left to committees which are powerful but not responsible, and to Houses whose nominal responsibility is in practice sadly weakened by their want of appropriate methods and organization.

When Congress has endeavoured to coerce the President by the use of its money powers, the case being one in which it could not attack him by ordinary legislation (either because such legislation would be unconstitutional, or for want of a two-thirds majority), it has proceeded not by refusing appropriations altogether, as the British House of Commons would do in like circumstances, but by attaching what is called a "rider" to an appropriation bill. Many years ago the House formed, and soon began to indulge freely in, the habit of inserting in bills appropriating money to the purposes of the public service, provisions relating to quite different matters, which there was not time to push through in the ordinary way. In 1867 Congress used this device against President Johnson, with whom it was then at open war, by attaching to an army appropriation bill a clause which virtually deprived the President of the command of the army, entrusting its management to the general highest in command (General Grant). The President yielded, knowing that if he refused the bill would be carried over his veto by a two-thirds vote; and a usage already mischievous was confirmed.

In 1879 the majority in Congress attempted to overcome, by the same weapon, the resistance of President Hayes to certain measures affecting the South which they desired to pass. They tacked these measures to three appropriation bills, army, legislative, and judiciary. The minority in both Houses fought hard against the riders, but were beaten. The President vetoed all three bills, and Congress was obliged to pass them without the riders. Next session the struggle recommenced in

the same form, and the President, by rejecting the money bills, again compelled Congress to drop the tacked provisions. This victory, which was of course due to the fact that the dominant party in Congress could not command a two-thirds majority, was deemed to have settled the question as between the executive and the legislature, and may have permanently discouraged the latter from recurring to the same tactics.

President Hayes in his veto messages argued strongly against the whole practice of tacking other matters to money bills; and a rule of the House now declares that an appropriation bill shall not carry any new legislation. It has certainly caused great abuses, and is forbidden by the Constitutions of many States. Recently the President has urged upon Congress the desirability of so amending the Federal Constitution as to enable him, as a State governor is by some recent State Constitutions allowed to do, to veto single items in an appropriation bill without rejecting the whole bill. Such an amendment is desired by enlightened men, because it would enable the executive to do its duty by the country in defeating the petty jobs now smuggled into these bills, without losing the supplies necessary for the public service which the bills provide. Small as the change seems, its adoption would cure one of the defects due to the absence of ministers from Congress, and save the nation millions of dollars a year, by diminishing wasteful expenditure on local purposes. But the process of amending the Constitution is so troublesome that even a change which involves no party issues may remain unadopted long after the best opinion has become unanimous in its favour.

CHAPTER XX

THE LEGISLATURE AND THE EXECUTIVE

The fundamental characteristic of the American National government is its separation of the legislative, executive, and judicial departments. This separation is the merit which the Philadelphia Convention chiefly sought to attain, and which the Americans have been wont to regard as most completely secured by their Constitution. In Europe, as well as in America, men are accustomed to talk of legislation and administration as distinct. But a consideration of their nature will show that it is not easy to separate these two departments in theory by analysis, and still less easy to keep them apart in practice.

Wherever the will of the people prevails, the legislature, since it either is or represents the people, can make itself omnipotent, unless checked by the action of the people themselves. It can do this in two ways. It may, like the republics of antiquity, issue decrees for particular cases as they arise, giving constant commands to all its agents, who thus become mere servants with no discretion left them. Or it may frame its laws with such particularity as to provide by anticipation for the greatest possible number of imaginable cases, in this way also so binding down its officials as to leave them no volition, no real authority.

Moreover, every legislature tends so to enlarge its powers as to encroach on the executive; and it has great advantages for so doing, because a succeeding legislature rarely consents to strike off any fetter its predecessor has imposed.

Thus the legitimate issue of the process would be the extinction or absorption of the executive as a power in the State. It would become a mere set of employés, obeying the legislature as the clerks in a bank obey the directors. If this does

not happen, the cause is generally to be sought in some one or more of the following circumstances: —

The legislature may allow the executive the power of appealing to the nation against itself (England).[1]

The people may from ancient reverence or the habit of military submission be so much disposed to support the executive as to embolden the latter to defy the legislature (Prussia).

The importance of foreign policy and the difficulty of taking it out of the hands of the executive may be so great that the executive will draw therefrom an influence reacting in favour of its general weight and dignity (Prussia, England, and, to some extent, France).

The founders of the American Constitution were terribly afraid of a strong executive, and desired to reserve the final and decisive voice to the legislature, as representing the people. They could not adopt the Greek method of an assembly both executive and legislative, for Congress was to be a body with limited powers; continuous sittings would be inconvenient, and the division into two equally powerful houses would evidently unfit it to govern with vigour and promptitude. Neither did they adopt the English method of a legislature governing through an executive dependent upon it. It was urged in the Philadelphia Convention of 1787 that the executive ought to be appointed by and made accountable to the legislature, as being the supreme power in the National government. This was overruled, because the majority of the Convention were fearful of "democratic haste and instability," fearful that the legislature would, in any event, become too powerful, and therefore anxious to build up some counter authority to check and balance it.

By making the President independent, and keeping him and his ministers apart from the legislature, the Convention thought they were strengthening him, as well as protecting it from attempts on his part to corrupt it. They were also weakening him. He lost the initiative in legislation which the English executive enjoys. He had not the English king's power of dissolving the legislature and throwing

[1] In France the President can dissolve the Chambers, but only with the consent of the Senate.

himself upon the country. Thus the executive magistrate seemed left at the mercy of the legislature. It could weave so close a network of statutes round him, that his discretion, his individual volition, seemed to disappear, and he ceased to be a branch of the government, being nothing more than a servant working under the eye and at the nod of his master. This would have been an absorption of the executive into the legislature more complete than that which England now presents, for the English prime minister is at any rate a leader, perhaps as necessary to his parliamentary majority as it is to him, whereas the President would have become a sort of superior police commissioner, irremovable during four years, but debarred from acting either on Congress or on the people.

Although the Convention may not have realized how helpless such a so-called executive must be, they felt the danger of encroachments by an ambitious legislature, and resolved to strengthen him against it. This was done by giving the President a veto which it requires a two-thirds vote of Congress to override. In doing this they partly reversed their previous action. They had separated the President and his ministers from Congress. They now bestowed on him legislative functions, though in a different form. He became a distinct branch of the legislature, but for negative purposes only. He could not propose, but he could refuse. Thus the executive was strengthened, not as an executive, but by being connected with the legislature; and the legislature, already weakened by its division into two co-equal Houses, was further weakened by finding itself liable to be arrested in any new departure on which two-thirds of both Houses were not agreed.

When the two Houses are of one mind, and the party hostile to the President has a two-thirds majority in both, the executive is almost powerless. It may be right that he should be powerless, because such majorities in both Houses presumably indicate a vast preponderance of popular opinion against him. The fact to be emphasized is, that in this case all "balance of powers" is gone. The legislature has swallowed up the executive, in virtue of the principle from which this discussion started, viz. that the executive is in free States only an agent who may be so limited by express and minute commands as to have no volition left him.

The strength of Congress consists in the right to pass statutes; the strength of the President in his right to veto them. But foreign affairs, as we have seen, cannot be brought within the scope of statutes. How then was the American legislature to deal with them? There were two courses open. One was to leave foreign affairs to the executive, as in England, giving Congress the same indirect control as the English Parliament enjoys over the Crown and ministry. This course could not be taken, because the President is independent of Congress and irremovable during his term. The other course would have been for Congress, like a Greek assembly, to be its own foreign office, or to create a Foreign Affairs committee of its members to handle these matters. As the objections to this course, which would have excluded the chief magistrate from functions naturally incidental to his position as official representative of the nation, were overwhelmingly strong, a compromise was made. The initiative in foreign policy and the conduct of negotiations were left to him, but the right of declaring war was reserved to Congress, and that of making treaties to one, the smaller and more experienced, branch of the legislature. A measure of authority was thus suffered to fall back to the executive which would have served to raise materially his position had foreign questions played as large a part in American politics as they have in French or English. They have, however, been comparatively unimportant, especially since 1815.

It may be said that there was yet another source whence the executive might draw strength to support itself against the legislature, viz. those functions which the Constitution, deeming them necessarily incident to an executive, has reserved to the President and excluded from the competence of Congress. But examination shows that there is scarcely one of these which the long arm of legislation cannot reach. The President is commander-in-chief of the army, but the numbers and organization of the army are fixed by statute. The President makes appointments, but the Senate has the right of rejecting them, and Congress may pass acts specifying the qualifications of appointees, and reducing the salary of any official except the President himself and the judges. The real strength of the executive, therefore, the rampart from behind which it can

resist the aggressions of the legislature, is in ordinary times the veto power.[1] In other words, it survives as an executive in virtue not of any properly executive function, but of the share in legislative functions which it has received; it holds its ground by force, not of its separation from the legislature, but of its participation in a right properly belonging to the legislature.[2]

An authority which depends on a veto capable of being overruled by a two-thirds majority may seem frail. But the experience of a century has shown that, owing to the almost equal strength of the two great parties, the Houses often differ, and there is rarely a two-thirds majority of the same colour in both. Hence the executive has enjoyed some independence. He is strong for defence, if not for attack. Congress can, except within that narrow sphere which the Constitution has absolutely reserved to him, baffle the President, can interrogate, check, and worry his ministers. But it can neither drive him the way it wishes him to go, nor dismiss them for disobedience or incompetence.

An individual man has some great advantages in combating an assembly. His counsels are less distracted. His secrets are better kept. He may sow discord among his antagonists. He can strike a more sudden blow. Julius Cæsar was more than a match for the Senate, Cromwell for the Long Parliament, even Louis Napoleon for the French Assembly of 1851. Hence, when the President happens to be a strong man, resolute, prudent, and popular, he may well hope to prevail against a body whom he may divide by the dexterous use of patronage,

[1] In moments of public danger, as during the War of Secession, the executive of course springs up into immense power, partly because the command of the army is then of the first importance; partly because the legislature, feeling its unfitness for swift and secret decisions, gives free rein to the executive, and practically puts its law-making powers at his disposal.

[2] What is said here of the National executive and National legislature is *a fortiori* true of the State executives and State legislatures. The State governor has no power of independent action whatever, being checked at every step by State statutes, and his discretion superseded by the minute directions which those statutes contain. He has not even ministers, because the other chief officials of the State are chosen, not by himself, but by popular vote. He has very little patronage; and he has no foreign policy at all. The State legislature would therefore prevail against him in everything, were it not for his veto and for the fact that the legislature is now generally restrained (by the provisions of the State Constitution) from passing laws on many topics.

may weary out by inflexible patience, may overawe by winning the admiration of the masses, always disposed to rally round a striking personality. But in a struggle extending over a long course of years an assembly has advantages over a succession of officers, especially of elected officers. Men come and go, but an assembly goes on for ever; it is immortal, because while the members change, the policy, the passion for extending its authority, the tenacity in clinging to what has once been gained, remain persistent. A weak magistrate comes after a strong magistrate, and yields what his predecessor had fought for; but an assembly holds all it has ever won. Its pressure is steady and continuous; it is always, by a sort of natural process, expanding its own powers and devising new methods for fettering its rival. Thus Congress, though it is no more respected or loved by the people now than it was seventy years ago, and has developed no higher capacity for promoting the best interests of the State, has succeeded in occupying nearly all the ground which the Constitution left debatable between the President and itself; and would, did it possess a better internal organization, be even more plainly than it now is the supreme power in the government.

In their effort to establish a balance of power, the framers of the Constitution so far succeeded that neither power has subjected the other. But they underrated the inconveniences which arise from the disjunction of the two chief organs of government. They relieved the administration from a duty which European ministers find exhausting and hard to reconcile with the proper performance of administrative work — the duty of giving attendance in the legislature and taking the lead in its debates. They secured continuity of executive policy for four years at least, instead of leaving government at the mercy of fluctuating majorities in an excitable assembly. But they so narrowed the sphere of the executive as to prevent it from leading the country, or even its own party in the country. They sought to make members of Congress independent, but in doing so they deprived them of some of the means which European legislators enjoy of learning how to administer, of learning even how to legislate in administrative topics. They condemned them to be architects without science, critics without experience, censors without responsibility.

CHAPTER XXI

THE FEDERAL COURTS

When in 1788 the loosely confederated States of North America united themselves into a nation, National tribunals were felt to be a necessary part of the National government. Under the Confederation there had existed no means of enforcing the treaties made or orders issued by the Congress, because the courts of the several States owed no duty to that feeble body, and had little will to aid it. Now that a Federal legislature had been established, whose laws were to bind directly the individual citizen, a Federal judicature was evidently needed to interpret and apply these laws, and to compel obedience to them. The alternative would have been to entrust the enforcement of the laws to State courts. But State courts were not fitted to deal with matters of a quasi-international character, such as admiralty jurisdiction and rights arising under treaties. They supplied no means for deciding questions between different States. They could not be trusted to do complete justice between their own citizens and those of another State. Being under the control of their own State governments, they might be forced to disregard any Federal law which the State disapproved; or even if they admitted its authority, might fail in the zeal or the power to give due effect to it. And being authorities co-ordinate with and independent of one another, with no common court of appeal placed over them to correct their errors or harmonize their views, they would be likely to interpret the Federal Constitution and statutes in different senses, and make the law uncertain by the variety of their decisions. These reasons pointed imperatively to the establishment of a new tribunal or set of tribunals, altogether detached from the States, as part of the machinery of the new government. Side by side of the thir-

teen (now forty-five) different sets of State courts, whose jurisdiction under State laws and between their own citizens was left untouched, there arose a new and complex system of Federal courts. The Constitution drew the outlines of the system. Congress perfected it by statutes; and as the details rest upon these statutes, Congress retains the power of altering them. Few American institutions are better worth studying than this intricate judicial machinery: few deserve more admiration for the smoothness of their working: few have more contributed to the peace and well-being of the country.

The Federal courts fall into three classes: —

The Supreme Court, which sits at Washington.

The Circuit courts.

The District courts.

The Supreme Court is directly created by Art. iii. § 1 of the Constitution, but with no provision as to the number of its judges. Originally there were six; at present there are nine, a chief justice, with a salary of $10,500, and eight associate justices (salary $10,000). The justices are nominated by the President and confirmed by the Senate. They hold office during good behaviour, *i.e.* are removable only by impeachment; and have thus a tenure even more secure than that of English judges, for the latter may be removed by the Crown on an address from both Houses of Parliament. Moreover, the English statutes secure the permanence only of the judges of the Supreme Court of judicature, not also of judges of county or other local courts, while the provisions of the American Constitution are held to apply to the inferior as well as the superior Federal judges.[1] The Fathers of the Constitution were extremely anxious to secure the independence of their judiciary, regarding it as a bulwark both for the people and for the States against aggressions of either Congress or the President.[2] They affirmed the life tenure by an unani-

[1] The United States judges in the Territories stand on a different footing.

[2] See Hamilton in *Federalist*, No. lxxviii.: "The standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the legislative body."

mous vote in the Convention of 1787, because they deemed the risk of the continuance in office of an incompetent judge a less evil than the subserviency of all judges to the legislature, which might flow from a tenure dependent on legislative will. The result has justified their expectations. The judges have shown themselves independent of Congress and of party, yet the security of their position has rarely tempted them to breaches of judicial duty. Impeachment has been four times resorted to, once only against a justice of the Supreme Court, and then unsuccessfully.[1] Attempts have been made, beginning from Jefferson, who argued that judges should hold office for terms of four or six years only, to alter the tenure of the Federal judges, as that of the State judges has been altered in most States; but Congress has always rejected the proposed constitutional amendment.

The Supreme Court sits at Washington from October till July in every year. The presence of six judges is required to pronounce a decision, a rule which, by preventing the division of the court into two or more branches, retards the despatch of business, though it has the advantage of securing a thorough consideration of every case. The sittings are held in the Capitol, in the chamber formerly occupied by the Senate, and the justices wear black gowns, being not merely the only public officers, but almost the only non-ecclesiastical persons of any kind whatever within the bounds of the United States who use any official dress.[2] Every case is discussed by the whole body twice over, once to ascertain the opinion of the majority, which is then directed to be set forth in a written judgment; then again when that written judgment, which one of the judges has prepared, is submitted for criticism and adoption as the judgment of the court.

The Circuit courts have been created by Congress under a power in the Constitution to establish "inferior courts."

[1] This was Samuel Chase of Maryland in 1804–5. The other cases were of district Federal judges. Two were convicted (one of violence, apparently due to drunkenness or insanity, the other of rebellion), the third was acquitted.

[2] Save that in some universities the president and professors, and (more rarely) the graduates, wear academic gowns on great occasions, such as the annual Commencement, and that gowns are worn by the judges in Federal Circuit courts and by the judges of the New York Court of Appeals.

There are at present nine judicial circuits, in which courts are held annually. Each of these has two Circuit judges (salary $6000), and to each there is also allotted one of the justices of the Supreme Court. The Circuit court may be held either by a Circuit judge alone, or by the Supreme Court Circuit justice alone, or by both together, or by either sitting along with the District judge (hereafter mentioned) of the district wherein the particular Circuit court is held, or by the District judge alone. A statute of 1891 has established Circuit Courts of Appeals, to which cases may be brought from District or Circuit courts, a further appeal lying, in some classes of cases, to the Supreme Court, to which, moreover, in certain cases, a direct appeal from the District or Circuit courts may still be brought. It is hoped that these new courts will relieve the Supreme Court of some of its now too heavy business.

The District courts are the third and lowest class of Federal tribunals. They are at present fifty-five in number, and their judges receive salaries of $5000 per annum. The Constitution does not expressly state whether they and the Circuit judges are to be appointed by the President and Senate like the members of the Supreme Court; but it has always been assumed that such was the intention, and the appointments are so made accordingly.

For the purpose of dealing with the claims of private persons against the Federal government there has been established in Washington a special tribunal called the Court of Claims, with five justices (salary $4500), from which an appeal lies direct to the Supreme Court.

The jurisdiction of the Federal courts extends to the following classes of cases, on each of which I say no more than what seems absolutely necessary to explain their nature.[1] All other cases have been left to the State courts, from which there does

[1] "All the enumerated cases of Federal cognizance are those which touch the safety, peace, and sovereignty of the nation, or which presume that State attachments, State prejudices, State jealousies, and State interests might sometimes obstruct or control the regular administration of justice. The appellate power in all these cases is founded on the clearest principles of policy and wisdom, and is necessary in order to preserve uniformity of decision upon all subjects within the purview of the Constitution." — Kent's *Commentaries* (Holmes' edition), vol. i. p. 320.

not lie (save as hereinafter specified) any appeal to the Federal courts.

1. "Cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority."

In order to enforce the supremacy of the National Constitution and laws over all State laws, it was necessary to place the former under the guardianship of the National judiciary. This provision accordingly brings before a Federal court every cause in which either party to a suit relies upon any Federal enactment. It entitles a plaintiff who bases his case on a Federal statute to bring his action in a Federal court: it entitles a defendant who rests his defence on a Federal enactment to have the action, if originally brought in a State court, removed to a Federal court.[1] But, of course, if the action has originally been brought in a State court, there is no reason for removing it unless the authority of the Federal enactment can be supposed to be questioned.

Accordingly, the rule laid down by the Judiciary Act (1789) provides "for the removal to the Supreme Court of the United States of the final judgment or decree in any suit, rendered in the highest court of law or equity of a State in which a decision could be had, in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favour of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute or a commission held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority. But to authorize the removal under that act, it must appear by the record, either expressly or by clear and necessary intendment,

[1] The removal may be before or after judgment given, and in the latter event, by way of appeal or by writ of error.

that some one of the enumerated questions did arise in the State court, and was there passed upon. It is not sufficient that it might have arisen or been applicable. And if the decision of the State court is in favour of the right, title, privilege, or exemption so claimed, the Judiciary Act does not authorize such removal, neither does it where the validity of the State law is drawn in question, and the decision of the State court is against its validity." [1]

The rule seems intricate, but the motive for it and the working of it are plain. Where in any legal proceeding a Federal enactment has to be construed or applied by a State court, if the latter supports the Federal enactment, *i.e.* considers it to govern the case, and applies it accordingly, the supremacy of Federal law is thereby recognized and admitted. There is therefore no reason for removing the case to a Federal tribunal. Such a tribunal could do no more to vindicate Federal authority than the State court has already done. But if the decision of the State court has been against the applicability of the Federal law, it is only fair that the party who suffers by the decision should be entitled to Federal determination of the point, and he has accordingly an absolute right to carry it before the Supreme Court.

The principle of this rule is applied even to executive acts of the Federal authorities. If, for instance, a person has been arrested by a Federal officer, a State court has no jurisdiction to release him on a writ of *habeas corpus*, or otherwise to inquire into the lawfulness of his detention by Federal authority, because, as was said by Chief-Justice Taney, "The powers of the general government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State court as if the line of division was traced by landmarks and monuments visible to the eye." [2]

[1] Cooley, *Constitutional Limitations*, p. 16. For details regarding the removal of suits, and the restrictions when the amount in dispute is small, see Cooley, *Principles of Constitutional Law*, p. 122 *sqq.*; and see also the Act of 3d March 1887.

[2] *Ableman* v. *Booth*, 21 How. 516.

2. "Cases affecting ambassadors, other public ministers, and consuls."

As these persons have an international character, it would be improper to allow them to be dealt with by a State court which has nothing to do with the National government, and for whose learning and respectability there may exist no such securities as those that surround the Federal courts.

3. "Cases of admiralty and maritime jurisdiction."

These are deemed to include not only prize cases but all maritime contracts, and all transactions relating to navigation, as well on the navigable lakes and rivers of the United States as on the high seas.

4. "Controversies to which the United States shall be a party."

This provision is obviously needed to protect the United States from being obliged to sue or be sued in a State court, to whose decision the National government could not be expected to submit. When a pecuniary claim is sought to be established against the Federal government, the proper tribunal is the Court of Claims.

5. "Controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof, and foreign States, citizens, or subjects."

In all these cases a State court is likely to be, or at any rate to seem, a partial tribunal, and it is therefore desirable to vest the jurisdiction in judges equally unconnected with the plaintiff and the defendant. By securing recourse to an unbiassed and competent tribunal, the citizens of every State obtain better commercial facilities than they could otherwise count upon, for their credit will stand higher with persons belonging to other States if the latter know that their legal rights are under the protection, not of local and possibly prejudiced judges, but of magistrates named by the National government, and unamenable to local influences.

One important part of the jurisdiction here conveyed has been subsequently withdrawn from the Federal judicature. When the Constitution was submitted to the people, a princi-

pal objection urged against it was that it exposed a State, although a sovereign commonwealth, to be sued by the individual citizens of some other State. That one State should sue another was perhaps necessary, for what other way could be discovered of terminating disputes? But the power as well as the dignity of a State would be gone if it could be dragged into court by a private plaintiff. Hamilton (writing in the *Federalist*) met the objection by arguing that the jurisdiction-giving clause of the Constitution ought not to be so construed, but must be read as being subject to the general doctrine that a sovereign body cannot be sued by an individual without its own consent, a doctrine not to be excluded by mere implication but only by express words.[1] However, in 1793, the Supreme Court, in the famous case of *Chisholm* v. *The State of Georgia*,[2] construed the Constitution in the very sense which Hamilton had denied, holding that an action did lie against Georgia at the suit of a private plaintiff; and when Georgia protested and refused to appear, the court proceeded (in 1794) to give judgment against her by default in case she should not appear and plead before a day fixed. Her cries of rage filled the Union, and brought other States to her help. An amendment (the eleventh) to the Constitution was passed through Congress and duly accepted by the requisite majority of the States, which declares that "the judicial power of the United States shall not be construed to extend to any suit commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign state."[3] Under the protection of this amendment, several have with impunity repudiated their debts.

The jurisdiction of the Supreme Court is original in cases affecting ambassadors, and wherever a State is a party; in

[1] *Federalist*, No. lxxxi. The same view was contemporaneously maintained by John Marshall (afterwards Chief-Justice) in the Virginia Convention of 1788.

[2] 2 Dall. 419.

[3] It has been held that the amendment applies only when a State is a party to the record, and therefore does not apply to the case of a State holding shares in a corporation. Neither does it apply to appeals and writs of error.

Very recently (March 1892) the Supreme Court have decided (by a large majority) in the case of *United States* v. *Texas* that the United States can sue a State.

other cases it is appellate; that is, cases may be brought to it from the inferior Federal courts and (under the circumstances before mentioned) from State courts. The jurisdiction is in some matters exclusive, in others concurrent with that of the State courts. Upon these subjects there have arisen many difficult and intricate questions, which I must pass by, because they would be unintelligible without long explanations.

One point, however, may be noted. The State courts cannot be invested by Congress with any jurisdiction, for Congress has no authority over them, and is not permitted by the Constitution to delegate any judicial powers to them. Hence the jurisdiction of a State court, wherever it is concurrent with that of Federal judges, is a jurisdiction which the court possesses of its own right, independent of the Constitution. And in some instances where congressional statutes have purported to impose duties on State courts, the latter have refused to accept and discharge them.

The criminal jurisdiction of the Federal courts, which extends to all offences against Federal law, is purely statutory. "The United States as such can have no common law. It derives its powers from the grant of the people made by the Constitution, and they are all to be found in the written law, and not elsewhere."[1]

The procedure of the Federal courts is prescribed by Congress, subject to some few rules contained in the Constitution, such as those which preserve the right of trial by jury in criminal cases[2] and suits at common law.[3] As "cases in law and equity" are mentioned, it is held that Congress could not accomplish such a fusion of law and equity as has been effected in several States of the Union, and was effected in England in 1873, but must maintain these methods of procedure as distinct, though administered by the same judges.

The law applied in the Federal courts is of course first and foremost that enacted by the Federal legislature, which, when it is applicable, prevails against any State law. But very often, as for instance in suits between citizens of different States, Federal law does not, or does only in a secondary way, come in question. In such instances the first thing is to determine

[1] Cooley, *Principles*, p. 131. [2] Art. iii. § 2. [3] Amendment vii. § 1.

what law it is that ought to govern the case, each State having a law of its own; and when this has been ascertained, it is applied to the facts, just as an English court would apply French or Scotch law in pronouncing on the validity of a marriage contracted in France or Scotland. In administering the law of any State (including its Constitution, its statutes, and its common law, which in Louisiana is the civil law in its French form) the Federal courts ought to follow the decisions of the State courts, treating those decisions as the highest authority on the law of the particular State. This doctrine is so fully applied that the Supreme Court has even overruled its own previous determinations on a point of State law in order to bring itself into agreement with the view of the highest court of the particular State. Needless to say, the State courts follow the decisions of the Federal courts upon questions of Federal law.[1]

For the execution of its powers each Federal court has attached to it an officer called the United States marshal, corresponding to the sheriff in the State governments, whose duty it is to carry out its writs, judgments, and orders by arresting prisoners, levying execution, putting persons in possession, and so forth. He is entitled, if resisted, to call on all good citizens for help; if they will not or cannot render it, he must refer to Washington and obtain the aid of Federal troops.

There exists also in every judiciary district a Federal public prosecutor, called the United States district attorney, who institutes proceedings against persons transgressing Federal laws or evading the discharge of obligations to the Federal treasury. Both sets of officials are under the direction of the attorney general, as head of the department of justice. They constitute a net-work of Federal authorities covering the whole territory of the Union, and independent of the officers of the State courts and of the public prosecutors who represent the

[1] "The judicial department of every government is the appropriate organ for construing the legislative acts of that government. . . . On this principle the construction given by this (the Supreme) Court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle the construction given by the courts of the various States to the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States." — Marshall, Chief-Justice, in *Elmendorf* v. *Taylor*, 10 Wheat. 109.

State governments. Where a State maintains a gaol for the reception of Federal prisoners, the U. S. marshal delivers his prisoners to the State gaoler; where this provision is wanting he must himself arrange for their custody.

The system described in this chapter is complex, for under it every yard of ground in the Union is covered by two jurisdictions, with two sets of judges and two sets of officers, responsible to different superiors, their spheres of action divided only by an ideal line, and their action liable in practice to clash. Nevertheless it works, and now, after a hundred years of experience, works smoothly. And it leads to few conflicts or heart-burnings, because the key to all difficulties is found in the principle that wherever Federal law is applicable Federal law must prevail, and that every suitor who contends that Federal law is applicable is entitled to have the point determined by a Federal court. The acumen of the lawyers and judges, the wealth of accumulated precedents, make the solution of these questions of applicability and jurisdiction easier than a European practitioner can realize: while the law-abiding habits of the people and their sense that the supremacy of Federal law and jurisdiction works to the common benefit of the whole people, secure general obedience to Federal judgments. The enforcement of the law, especially the criminal law, in some parts of America leaves much to be desired; but the difficulties which arise are now due not to conflicts between State and Federal pretensions but to other tendencies equally hostile to both authorities.

CHAPTER XXII

THE COURTS AND THE CONSTITUTION

No feature in the government of the United States has awakened so much curiosity in the European mind, caused so much discussion, received so much admiration, and been more frequently misunderstood, than the duties assigned to the Supreme Court and the functions which it discharges in guarding the ark of the Constitution. Yet there is really no mystery about the matter. It is not a novel device. It is not a complicated device. It is the simplest thing in the world if approached from the right side.

In England and many other modern States there is no difference in authority between one statute and another. All are made by the legislature: all can be changed by the legislature. What are called in England constitutional statutes, such as Magna Charta, the Bill of Rights, the Act of Settlement, the Acts of Union with Scotland and Ireland, are merely ordinary laws, which could be repealed by Parliament at any moment in exactly the same way as it can repeal a highway act or lower the duty on tobacco. The habit has grown up of talking of the British Constitution as if it were a fixed and definite thing. But there is in England no such thing as a Constitution apart from the rest of the law: there is merely a mass of law, consisting partly of statutes and partly of decided cases and accepted usages, in conformity with which the government of the country is carried on from day to day, but which is being constantly modified by fresh statutes and cases. The same thing existed in ancient Rome, and everywhere in Europe a century ago. It is, so to speak, the "natural," and used to be the normal, condition of things in all countries, free or despotic.

The condition of America is wholly different. There the name Constitution designates a particular instrument adopted

in 1788, amended in some points since, which is the foundation of the National government. This Constitution was ratified and made binding, not by Congress, but by the people acting through conventions assembled in the thirteen States which then composed the Confederation. It created a legislature of two Houses; but that legislature, which we call Congress, has no power to alter it in the smallest particular. That which the people have enacted, the people only can alter or repeal.

Here therefore we observe two capital differences between England and the United States. The former has left the outlines as well as the details of her system of government to be gathered from a multitude of statutes and cases. The latter has drawn them out in one comprehensive fundamental enactment. The former has placed these so-called constitutional laws at the mercy of her legislature, which can abolish when it pleases any institution of the country, the Crown, the House of Lords, the Established Church, the House of Commons, Parliament itself.[1] The latter has placed her Constitution altogether out of the reach of Congress, providing a method of amendment whose difficulty is shown by the fact that it has been very sparingly used.

In England Parliament is omnipotent. In America Congress is doubly restricted. It can make laws only for certain purposes specified in the Constitution, and in legislating for these purposes it must not transgress any provision of the Constitution itself. The stream cannot rise above its source.

Suppose, however, that Congress does so transgress, or does overpass the specified purposes. It may do so intentionally: it is likely to do so inadvertently. What happens? If the Constitution is to be respected, there must be some means of securing it against Congress. If a usurpation of power is at-

[1] Parliament of course cannot restrict its own powers by any particular act because that act might be repealed in a subsequent session, and indeed any subsequent Act inconsistent with any of its provisions repeals *ipso facto* that provision. (For instance, the Act of Union with Scotland (6 Anne, c. 11) declared certain provisions of the Union, for the establishment of Presbyterian church government in Scotland, to be "essential and fundamental parts of the Union," but some of those provisions have been altered by subsequent statutes.) Parliament could, however, extinguish itself by formally dissolving itself, leaving no legal means whereby a subsequent Parliament could be summoned.

tempted, how is it to be checked? If a mistake is committed, who sets it right?

The interpretation of laws belongs to courts of justice. A law implies a tribunal, not only in order to direct its enforcement against individuals, but to adjust it to the facts, *i.e.* to determine its precise meaning and apply that meaning to the circumstances of the particular case. The legislature, which can only speak generally, makes every law in reliance on this power of interpretation. It is therefore obvious that the question, whether a congressional statute offends against the Constitution, must be determined by the courts, not merely because it is a question of legal construction, but because there is nobody else to determine it. Congress cannot do so, because Congress is a party interested. If such a body as Congress were permitted to decide whether the acts it had passed were constitutional, it would of course decide in its own favour, and to allow it to decide would be to put the Constitution at its mercy. The President cannot, because he is not a lawyer, and he also may be personally interested. There remain only the courts, and these must be the National or Federal courts, because no other courts can be relied on in such cases. So far again there is no mystery about the matter.

The United States is a federation of commonwealths, each of which has its own Constitution and laws. The Federal Constitution not only gives certain powers to Congress, as the National legislature, but recognizes certain powers in the States, in virtue whereof their respective peoples have enacted fundamental State laws (the State Constitutions) and have enabled their respective legislatures to pass State statutes. However, as the nation takes precedence of the States, the Federal Constitution, which is the supreme law of the land everywhere, and the statutes duly made by Congress under it, are preferred to all State Constitutions and statutes; and if any conflict arise between them, the latter must give way. The same phenomenon therefore occurs as in the case of an inconsistency between the Constitution and a congressional statute. Where it is shown that a State Constitution or statute infringes either the Federal Constitution or a Federal (*i.e.* congressional) statute, the State Constitution or statute must be declared invalid. And this declaration must, of course, proceed from the courts,

nor solely from the Federal courts; because when a State court decides against its own statutes or Constitution in favour of a Federal law, its decision is final.

It will be observed that in all this there is no conflict between the law courts and any legislative body. The conflict is between different kinds of laws. The duty of the judges is as strictly confined to the interpretation of the laws cited to them as it is in England or France; and the only difference is that in America there are laws of four different degrees of authority, whereas in England all laws (excluding mere by-laws, Privy Council ordinances, etc.) are equal because all proceed from Parliament. These four kinds of American laws are: —

I. The Federal Constitution.
II. Federal statutes.
III. State Constitutions.
IV. State statutes.[1]

The American law court therefore does not itself enter on any conflict with the legislature. It merely secures to each kind of law its due authority. It does not even preside over a conflict and decide it, for the relative strength of each kind of law has been settled already. All the court does is to declare that a conflict exists between two laws of different degrees of authority. Then the question is at an end, for the weaker law is extinct, or, to put the point more exactly, a flaw has been indicated which makes the world see that if the view of the court be correct, the law is in fact null. The court decides nothing but the case before it: and any one may, if he thinks the court wrong, bring up a fresh case raising again the question whether the law is valid.

This is the abstract statement of the matter; but there is also an historical one. Many of the American colonies received charters from the British Crown, which created or recognized colonial assemblies, and endowed these with certain powers

[1] Of these, the Federal Constitution prevails against all other laws. Federal statutes, if made in pursuance of and conformably to the Constitution, prevail against III. and IV. If in excess of the powers granted by the Constitution, they are to that extent invalid. A State Constitution yields to I. and II., but prevails against the statutes of the State.

of making laws for the colony. Such powers were of course limited, partly by the charter, partly by usage, and were subject to the superior authority of the Crown or of the British Parliament. Questions sometimes arose in colonial days whether the statutes made by these assemblies were in excess of the powers conferred by the charter; and if the statutes were found to be in excess, they were held invalid by the courts, that is to say, in the first instance, by the colonial courts, or, if the matter was carried to England, by the Privy Council.

When the thirteen American colonies asserted their independence in 1776, they replaced these old charters by new Constitutions, and by these Constitutions entrusted their respective legislative assemblies with certain specified and limited legislative powers. The same question was then liable to recur with regard to a statute passed by one of these assemblies. If such a statute was in excess of the power which the State Constitution conferred on the State legislature, or in any way transgressed the provisions of that Constitution, it was invalid, and acts done under it were void. The question, like any other question of law, came for decision before the courts of the State. Thus, in 1786, the Supreme Court of Rhode Island held that a statute of the legislature which purported to make a penalty collectible on summary conviction, without trial by jury, gave the court no jurisdiction, *i.e.* was invalid, the colonial charter, which was then still in force as the Constitution of the State, having secured the right of trial by jury in all cases. When the Constitution of the United States came into operation in 1789, and was declared to be paramount to all State Constitutions and State statutes, no new principle was introduced; there was merely a new application, as between the nation and the States, of the old doctrine that a subordinate and limited legislature cannot pass beyond the limits fixed for it. It was clear, on general principles, that a State law incompatible with a duly enacted Federal law must give way; the only question was: What courts are to pronounce upon the question whether such incompatibility exists? Who is to decide whether or no the authority given to Congress has been exceeded, and whether or no the State law contravenes the Federal Constitution or a Federal statute?

In 1787 the only pre-existing courts were the State courts. If a case coming before them raised the point whether a State Constitution or statute was inconsistent with the Federal Constitution or a statute of Congress, it was their duty to decide it, like any other point of law. But their decision could not safely be accepted as final, because, being themselves the offspring of, and amenable to the State governments, they would naturally tend to uphold State laws against the Federal Constitution or statutes. Hence it became necessary to call in courts created by the central Federal authority and co-extensive with it — that is to say, those Federal courts which have been already described. The matter seems complicated, because we have to consider not only the superiority of the Federal Constitution to the Federal legislature but also the superiority of both the Federal Constitution and Federal statutes to all State laws. But the principle is the same and equally simple in both sets of cases. Both are merely instances of the doctrine, that a law-making body must not exceed its powers, and that when it has attempted to exceed its powers, its so-called statutes are not laws at all, and cannot be enforced.

In America the supreme law-making power resides in the people. Whatever they enact is universally binding. All other law-making bodies are subordinate, and the enactments of such bodies must conform to the supreme law, else they will perish at its touch, as a fishing smack goes down before an ocean steamer. And these subordinate enactments, if at variance with the supreme law, are invalid from the first, although their invalidity may remain for years unnoticed or unproved. It can be proved only by the decision of a court in a case which raises the point for determination. The phenomenon cannot arise in a country whose legislature is omnipotent, but naturally arises wherever we find a legislature limited by a superior authority, such as a Constitution which the legislature cannot alter.

All that the judges have to do is to discover from the enactments before them what the will of the people is, and apply that will to the facts of a given case. The more general or ambiguous the language which the people have used, so much the more difficult is the task of interpretation, so much greater the need for ability and integrity in the judges. But the task

is always the same in its nature. The judges have no concern with the motives or the results of an enactment, otherwise than as these may throw light on the sense in which the enacting authority intended it. It would be a breach of duty for them to express, I might almost say a breach of duty to entertain, an opinion on its policy except so far as its policy explains its meaning. They may think a statute excellent in purpose and working, but if they cannot find in the Constitution a power for Congress to pass it, they must brush it aside as invalid. They may deem another statute pernicious, but if it is within the powers of Congress, they must enforce it. To construe the law, that is, to elucidate the will of the people as supreme lawgiver, is the beginning and end of their duty. And if it be suggested that they may overstep their duty, and may, seeking to make themselves not the exponents but the masters of the Constitution, twist and pervert it to suit their own political views, the answer is that such an exercise of judicial will would rouse the distrust and displeasure of the nation, and might, if persisted in, provoke resistance to the law as laid down by the court, possibly an onslaught upon the court itself.

The importance of these judiciary functions can hardly be exaggerated. It arises from two facts. One is that as the Constitution cannot easily be changed, a bad decision or its meaning, *i.e.* a decision which the general opinion of the profession condemns, may go uncorrected. In England, if a court has construed a statute in a way unintended or unexpected, Parliament sets things right next session by amending the statute, and so prevents future decisions to the same effect. But American history shows only one instance in which an unwelcome decision on the meaning of the Constitution has been thus dealt with, viz. the decision, that a State could be sued by a private citizen, which led to the eleventh amendment, whereby it was declared that the Constitution should not cover a case which the court had held it did cover.

The other fact which makes the function of an American judge so momentous is the brevity, the laudable brevity, of the Constitution. The words of that instrument are general, laying down a few large principles. The cases which will arise as to the construction of these general words cannot be fore-

seen till they arise. When they do arise the generality of the words leaves open to the interpreting judges a far wider field than is afforded by ordinary statutes which, since they treat of one particular subject, contain enactments comparatively minute and precise. Hence, although the duty of a court is only to interpret, the considerations affecting interpretation are more numerous than in the case of ordinary statutes, more delicate, larger in their reach and scope. They sometimes need the exercise not merely of legal acumen and judicial fairness, but of a comprehension of the nature and methods of government which one does not demand from the European judge who walks in the narrow path traced for him by ordinary statutes. It is therefore hardly an exaggeration to say that the American Constitution as it now stands, with the mass of fringing decisions which explain it, is a far more complete and finished instrument than it was when it came fire-new from the hands of the Convention. It is not merely their work but the work of the judges, and most of all of one man, the great Chief-Justice Marshall.

These observations may suffice to show that there is nothing strange or mysterious about the relation of the Federal courts to the Constitution. The plan which the Convention of 1787 adopted is simple, useful, and conformable to general legal principles. It is, in the original sense of the word, an elegant plan. But it is not novel, as was indeed observed by Hamilton in the *Federalist*. It was at work in the States before the Convention of 1787 met. It was at work in the thirteen colonies before they revolted from England. It is an application of old and familiar legal doctrines. Such novelty as there is belongs to the scheme of a supreme or rigid Constitution, reserving the ultimate power to the people, and limiting in the same measure the power of a legislature.

It is nevertheless true that there is no part of the American system which reflects more credit on its authors or has worked better in practice. It has had the advantage of relegating questions not only intricate and delicate, but peculiarly liable to excite political passions, to the cool, dry atmosphere of judicial determination. The relations of the central Federal power to the States, and the amount of authority which Congress and the President are respectively entitled to exercise,

have been the most permanently grave questions in American history, with which nearly every other political problem has become entangled. If they had been left to be settled by Congress, itself an interested party, or by any dealings between Congress and the State legislatures, the dangers of a conflict would have been extreme, and instead of one civil war there might have been several. But the universal respect felt for the Constitution, a respect which grows the longer it stands, has disposed men to defer to any decision which seems honestly and logically to unfold the meaning of its terms. In obeying such a decision they are obeying, not the judges, but the people who enacted the Constitution. To have foreseen that the power of interpreting the Federal Constitution and statutes, and of determining whether or no State Constitutions and statutes transgress Federal provisions, would be sufficient to prevent struggles between the National government and the State governments, required great insight and great faith in the soundness and power of a principle.

While the Constitution was being framed the suggestion was made, and for a time seemed likely to be adopted, that a veto on the acts of State legislatures should be conferred upon the Federal Congress. Discussion revealed the objections to such a plan. Its introduction would have offended the sentiment of the States, always jealous of their autonomy; its exercise would have provoked collisions with them. The disallowance of a State statute, even if it did really offend against the Federal Constitution, would have seemed a political move, to be resented by a political counter move. And the veto would often have been pronounced before it could have been ascertained exactly how the State statute would work, sometimes, perhaps, pronounced in cases where the statute was neither pernicious in itself nor opposed to the Federal Constitution. But by the action of the courts the self-love of the States is not wounded, and the decision annulling their laws is nothing but a tribute to the superior authority of that supreme enactment to which they were themselves parties, and which they may themselves desire to see enforced against another State on some not remote occasion. However, the idea of a veto by Congress was most effectively demolished in the Convention by Roger Sherman, who acutely remarked that a

veto would seem to recognize as valid the State statute objected to, whereas if inconsistent with the Constitution it was really invalid already and needed no veto.

By leaving constitutional questions to be settled by the courts of law another advantage was incidentally secured. The court does not go to meet the question; it waits for the question to come to it. When the court acts it acts at the instance of a party. Sometimes the plaintiff or the defendant may be the National government or a State government, but far more frequently both are private persons, seeking to enforce or defend their private rights. For instance, in the famous case which established the doctrine that a statute passed by a State repealing a grant of land to an individual made on certain terms by a previous statute is a law "impairing the obligation of a contract," and therefore invalid, under Art. i. § 10 of the Federal Constitution; the question came before the court on an action by one Fletcher against one Peck on a covenant contained in a deed made by the latter; and to do justice between plaintiff and defendant it was necessary to examine the validity of a statute passed by the legislature of Georgia.

This method has the merit of not hurrying a question on, but leaving it to arise of itself. Full legal argument on both sides is secured by the private interests which the parties have in setting forth their contentions; and the decision when pronounced, since it appears to be, as in fact it is, primarily a decision upon private rights, obtains that respect and moral support which a private plaintiff or defendant establishing his legal right is entitled to from law-abiding citizens. A State might be provoked to resistance if it saw, as soon as it had passed a statute, the Federal government inviting the Supreme Court to declare that statute invalid. But when the Federal authority stands silent, and a year after in an ordinary action between Smith and Jones the court decides in favour of Jones, who argued that the statute on which the plaintiff relied was invalid because it transgressed some provision of the Constitution, everybody feels that Jones was justified in so arguing, and that since judgment was given in his favour he must be allowed to retain the money which the court has found to be his, and the statute which violated his private right must fall to the ground.

CHAPTER XXIII

THE WORKING OF THE COURTS

Those readers who have followed thus far the account given of the Federal courts have probably asked themselves how judicial authorities can sustain the functions which America requires them to discharge. It is plain that judges, when sucked into the vortex of politics, must lose dignity, impartiality, and influence. But how can judges keep out of politics, when political issues raising party passions come before them? Must not constitutional questions, questions as to the rights under the Constitution of the Federal government against the States, and of the branches of the Federal government against one another, frequently involve momentous political issues? In the troublous times during which the outlines of the English Constitution were settled, controversy often raged round the courts, because the decision of contested points lay in their hands. When Charles I. could not induce Parliament to admit the right of levying contributions which he claimed, and Parliament relied on the power of the purse as its defence against Charles I., the question whether ship-money could lawfully be levied was vital to both parties, and the judges held the balance of power in their hands. At that moment the law could not be changed, because the Houses and the king stood opposed: hence everything turned on the interpretation of the existing law. In America the Constitution is at all times very hard to change: much more then must political issues turn on its interpretation. And if this be so, must not the interpreting court be led to assume a control over the executive and legislative branches of the government, since it has the power of declaring their acts illegal?

There is ground for these criticisms. The evil they point to has occurred and may recur. But it occurs very rarely, and

may be averted by the same prudence which the courts have hitherto generally shown. The causes which have enabled the Federal courts to avoid it, and to maintain their dignity and influence almost unshaken, are the following: —

I. The Supreme Court — I speak of the Supreme Court because its conduct has governed that of inferior Federal courts — has steadily refused to interfere in purely political questions. Whenever it finds any discretion given to the President, any executive duty imposed on him, it considers the manner in which he exercises his discretion and discharges the duty to be beyond its province. Whenever the Constitution has conferred a power of legislating upon Congress, the court declines to inquire whether the use of the power was in the case of a particular statute passed by Congress either necessary or desirable, or whether it was exerted in a prudent manner, for it holds all such matters to be within the exclusive province of Congress.

"In measures exclusively of a political, legislative, or executive character, it is plain that as the supreme authority as to these questions belongs to the legislative and executive departments they cannot be re-examined elsewhere. Thus Congress, having the power to declare war, to levy taxes, to appropriate money, to regulate intercourse and commerce with foreign nations, their mode of executing these powers can never become the subject of re-examination in any other tribunal. So the power to make treaties being confided to the President and Senate, when a treaty is properly ratified it becomes the law of the land, and no other tribunal can gainsay its stipulations. Yet cases may readily be imagined in which a tax may be laid, or a treaty made upon motives and grounds wholly beside the intention of the Constitution. The remedy, however, in such cases is solely by an appeal to the people at the elections, or by the salutary power of amendment provided by the Constitution itself."[1]

Adherence to this principle has enabled the court to avoid an immixture in political strife which must have destroyed its credit, has deterred it from entering the political arena, where it could have been weak, and enabled it to act without fear in the sphere of pure law, where it is strong. Occasionally, however, as I shall explain presently, the court has come into collision with the executive. Occasionally it has been required to give decisions which have worked with tremendous force on politics. The most famous of these was the Dred Scott case, in which the Supreme Court, on an action by a negro for

[1] Story, *Commentaries on the Constitution*, § 374.

assault and battery against the person claiming to be his master, declared that a slave taken temporarily to a free State and to a Territory in which Congress had forbidden slavery, and afterwards returning into a slave State and resuming residence there, was not a citizen capable of suing in the Federal courts if by the law of the slave State he was still a slave. This was the point which actually called for decision; but the majority of the court, for there was a dissentient minority, went further, and delivered a variety of *dicta* on various other points touching the legal status of negroes and the constitutional view of slavery. This judgment, since the language used in it seemed to cut off the hope of a settlement by the authority of Congress of the then (1857) pending disputes over slavery and its extension, did much to precipitate the civil war.

II. Looking upon itself as a pure organ of the law, commissioned to do justice between man and man, but to do nothing more, the Supreme Court has steadily refused to decide abstract questions, or to give opinions in advance by way of advice to the executive. When, in 1793, President Washington requested its opinion on the construction of the treaty of 1778 with France, the judges declined to comply.

III. Other causes which have sustained the authority of the court by saving it from immersion in the turbid pool of politics, are the strength of professional feeling among American lawyers, the relation of the bench to the bar, the power of the legal profession in the country. The keen interest which the profession takes in the law secures a large number of acute and competent critics of the interpretation put upon the law by the judges. Such men form a tribunal to whose opinion the judges are sensitive, and all the more sensitive because the judges, like those of England, but unlike those of continental Europe, have been themselves practising counsel. The better lawyers of the United States do not sink their professional sentiment and opinion in their party sympathies. They know good law even when it goes against themselves, and privately condemn as bad law a decision none the less because it benefits their party or their client. The Federal judge who has recently quitted the ranks of the bar remains in sympathy with it, respects its views, desires its approbation. Both his inbred professional habits, and his respect for those

traditions which the bar prizes, restrain him from prostituting his office to party objects. Though he has usually been a politician, and owes his promotion to his party, his political trappings drop off him when he mounts the supreme bench. He has now nothing to fear from party displeasure, because he is irremovable (except by impeachment), nothing to hope from party favour, because he is at the top of the tree and can climb no higher. Virtue has all the external conditions in her favour. It is true that virtue is compatible with the desire to extend the power and jurisdiction of the court. But even allowing that this motive may occasionally sway the judicial mind, the circumstances which surround the action of a tribunal debarred from initiative, capable of dealing only with concrete cases that come before it at irregular intervals, unable to appropriate any of the sweets of power other than power itself, make a course of systematic usurpation more difficult and less seductive than it would be to a legislative assembly or an executive council. As the respect of the bench for the bar tends to keep the judges in the straight path, so the respect and regard of the bar for the bench, a regard grounded on the sense of professional brotherhood, ensure the moral influence of the court in the country.

That this factor in the maintenance of judicial influence proved so potent was largely due to the personal eminence of the judges. One must not call that a result of fortune which was the result of the wisdom of successive Presidents in choosing capable men to sit on the supreme Federal bench. Yet one man was so singularly fitted for the office of chief-justice, and rendered such incomparable services in it, that the Americans have been wont to regard him as a special gift of favouring Providence. This was John Marshall, who presided over the Supreme Court from 1801 till his death in 1835 at the age of eighty, and whose fame overtops that of all other American judges more than Papinian overtops the jurists of Rome or Lord Mansfield the jurists of England. No other man did half so much either to develop the Constitution by expounding it, or to secure for the judiciary its rightful place in the government as the living voice of the Constitution. No one vindicated more strenuously the duty of the court to establish the

authority of the fundamental law of the land, no one abstained more scrupulously from trespassing on the field of executive administration or political controversy. The admiration and respect which he and his colleagues won for the court remain its bulwark: the traditions which were formed under him and them have continued in general to guide the action and elevate the sentiments of their successors.

Nevertheless, the court has not always had smooth seas to navigate. It has more than once been shaken by blasts of unpopularity. It has not infrequently found itself in conflict with other authorities.

The first attacks arose out of its decision that it had jurisdiction to entertain suits by private persons against a State.[1] This point was set at rest by the eleventh amendment; but the States then first learnt to fear the Supreme Court as an antagonist. In 1801, in an application requiring the secretary of state to deliver a commission, it declared itself to have the power to compel an executive officer to fulfil a ministerial duty affecting the rights of individuals.[2] President Jefferson protested angrily against this claim, but it has been repeatedly reasserted, and is now undoubted law. It was in this same case that the court first explicitly asserted its duty to treat as invalid an Act of Congress inconsistent with the Constitution.

In 1805 its independence was threatened by the impeachment of Justice Chase, the aim of the Republican (Democratic) party then dominant in Congress being to set a precedent for ejecting, by means of impeachment, judges (and especially Chief-Justice Marshall) whose attitude on constitutional questions they condemned. The acquittal of Chase dispelled this danger: nor could John Randolph, who then led the House, secure the acceptance of an amendment to the Constitution which he thereupon proposed for enabling the President to remove Federal judges on an address of both Houses of Congress. In 1806 the court for the first time pronounced a State statute

[1] *Chisholm* v. *Georgia*, see above, p. 174.

[2] *Marbury* v. *Madison*, 1 Cranch, 137. In this case the court refused to issue the mandamus asked for, but upon the ground that the statute of Congress giving to the Supreme Court original jurisdiction to issue a mandamus was inconsistent with the Constitution. See also *Kendal* v. *United States*, 12 Peters, 616; *United States* v. *Schurz*, 102 U. S. 378.

void; in 1816 and 1821 it rendered decisions establishing its authority as a supreme court of appeal from State courts on "Federal questions," and unfolding the full meaning of the doctrine that the Constitution, and Acts of Congress duly made in pursuance of the Constitution, are the fundamental and supreme law of the land. This was a doctrine which had not been adequately apprehended even by lawyers, and its development, legitimate as we now deem it, roused opposition. The ultra-Democrats who came into power under President Jackson in 1829 were specially hostile to a construction of the Constitution which seemed to trench upon State rights,[1] and when in 1832 the Supreme Court ordered the State of Georgia to release persons imprisoned under a Georgian statute which the court declared to be invalid,[2] Jackson, whose duty it was to enforce the decision by the executive arm, remarked, "John Marshall has pronounced his judgment: let him enforce it if he can." The successful resistance of Georgia in the Cherokee dispute[3] gave a blow to the authority of the court, and marked the beginning of a new period in its history, during which, in the hands of judges mostly appointed by the Democratic party, it made no further advance in power.

In 1857 the Dred Scott judgment, pronounced by a majority of the judges, excited the strongest outbreak of displeasure yet witnessed. The Republican party, then rising into strength, denounced this decision in the resolutions of the convention which nominated Abraham Lincoln in 1860, and its doctrine as to citizenship was expressly negatived in the fourteenth constitutional amendment adopted after the War of Secession.

It was feared that the political leanings of the judges who

[1] Martin Van Buren (President 1837–41) expressed the feelings of the bulk of his party when he complained bitterly of the encroachments of the Supreme Court, and declared that it would never have been created had the people foreseen the powers it would acquire.

[2] This was only one act in the long struggle of the Cherokee Indians against the oppressive conduct of Georgia — conduct which the court emphatically condemned, though it proved powerless to help the unhappy Cherokees.

[3] The matter did not come to an absolute conflict, because before the time arrived for the court to direct the United States marshal of the district of Georgia to summon the *posse comitatus* and the President to render assistance in liberating the prisoners, the prisoners submitted to the State authorities, and were thereupon released. They probably believed that the imperious Jackson would persist in his hostility to the Supreme Court.

formed the court at the outbreak of the war would induce them to throw legal difficulties in the prosecution of the measures needed for re-establishing the authority of the Union. These fears proved ungrounded, although some contests arose as to the right of officers in the Federal army to disregard writs of *habeas corpus* issued by the court.[1] In 1868, having then become Republican in its sympathies by the appointment of new members as the older judges disappeared, it tended to sustain the congressional plan of Reconstruction which President Johnson desired to defeat, and in subsequent cases it has given effect to most, though not to all, of the statutes passed by Congress under the three amendments which abolished slavery and secured the rights of the Negroes. In 1866 it refused to entertain proceedings instituted for the purpose of forbidding the President to execute the Reconstruction Acts.

Two of its later acts are thought by some to have affected public confidence. One of these was the reversal, first in 1871, and again upon broader but not inconsistent grounds, in 1884, of the decision, given in 1870, which declared invalid the Act of Congress making government paper a legal tender for debts. The original decision of 1870 was rendered by a majority of five to three. The court was afterwards changed by the creation of an additional judgeship, and by the appointment of a new member to fill a vacancy which occurred after the settlement, though before the delivery, of the first decision. Then the question was brought up again in a new case between different parties, and decided in the opposite sense (*i.e.* in favour of the power of Congress to pass legal tender Acts) by a majority of five to four. Finally, in 1884, another suit having brought up a point practically the same, though under a later statute passed by Congress, the court determined with only one dissentient voice that the power existed. This last decision excited some criticism, especially among the more conservative lawyers, because it seemed to remove restrictions hitherto supposed to exist on the authority of Congress, recognizing the right to establish a forced paper currency as an attribute of the sovereignty of the National government. But be the decision right or wrong, a point on which high author-

[1] See *Ex parte Milligan*, 4 Wall. 129.

ities are still divided, the reversal by the highest court in the land of its own previous decision may have tended to unsettle men's reliance on the stability of the law; while the manner of the earlier reversal, following as it did on the appointment of two new justices, both known to be in favour of the view which the majority of the court had just disapproved, disclosed a weak point in the constitution of the tribunal which may some day prove fatal to its usefulness.

The other misfortune was the interposition of the court in the presidential electoral count dispute of 1877. The five justices of the Supreme Court who were included in the electoral commission then appointed voted on party lines no less steadily than did the senators and representatives who sat on it. A function scarcely judicial, and certainly not contemplated by the Constitution, was then for the first time thrown upon the judiciary, and in discharging it the judiciary acted exactly like non-judicial persons.

Notwithstanding this occurrence, which after all was quite exceptional, the credit and dignity of the Supreme Court stand very high. No one of its members has ever been suspected of corruption, and comparatively few have allowed their political sympathies to disturb their official judgment. Though for many years back every President (except Harrison, February 1893) has appointed only men of his own party, and frequently leading politicians of his own party, the new-made judge has left partisanship behind him, while no doubt usually retaining that bias or tendency of his mind which party training produces. When a large majority of the judges belong to one party, the other party regret the fact, and welcome the prospect of putting in some of their own men as vacancies occur; yet the desire for an equal representation of both parties is based, not on a fear that suitors will suffer from the influence of party spirit, but on the feeling that when any new constitutional question arises it is right that the tendencies which have characterized the view of the Constitution taken by the Democrats on the one hand and the Republicans on the other, should each be duly represented.

Apart from these constitutional questions, the value of the Federal courts to the country at large has been inestimable. They have done much to meet the evils which an elective and

ill-paid State judiciary inflicts on some of the newer and a few even of the older States. The Federal Circuit and District judges, small as are their salaries, are in most States individually superior men to the State judges, because the greater security of tenure induces abler men to accept the post. Being irremovable, they feel themselves independent of parties and politicians, whom the elected State judge, holding for a limited term, may be tempted to conciliate with a view to re-election. Plaintiffs, therefore, when they have a choice of suing in a State court or a Federal court, frequently prefer the latter; and the litigant who belongs to a foreign country, or to a different State from that in which his opponent resides, may think his prospects of an unbiassed decision better before it than before a State tribunal. Nor is it without interest to add that criminal justice is more strictly administered in the Federal courts.

Federal judgeships of the second and third rank (Circuit and District) have been hitherto given to the members of the President's party, and by an equally well established usage, to persons resident in the State or States where the Circuit or District court is held. In 1891, however, a Republican President appointed two Democrats to be judges of the new Circuit Courts of Appeals, and placed several Democrats on the (temporary) Private Land Claims court. Cases of corruption are practically unknown, and partisanship has been rare. The chief defects have been the inadequacy of the salaries, and the insufficiency of the staff in the more populous commercial States to grapple with the vast and increasing business which flows in upon them. So too, in the Supreme Court, arrears have so accumulated that it is sometimes three years or more from the time when a cause is entered till the day when it comes on for hearing.

One question remains to be put and answered.

The Supreme Court is the living voice of the Constitution —that is, of the will of the people expressed in the fundamental law they have enacted. It is, therefore, as some one has said, the conscience of the people, who have resolved to restrain themselves from hasty or unjust action by placing their representatives under the restriction of a permanent law. It is the guarantee of the minority, who, when threat-

ened by the impatient vehemence of a majority, can appeal to this permanent law, finding the interpreter and enforcer thereof in a court set high above the assaults of faction.

To discharge these momentous functions, the court must be stable even as the Constitution is stable. Its spirit and tone must be that of the people at their best moments. It must resist transitory impulses, and resist them the more firmly the more vehement they are. Entrenched behind impregnable ramparts, it must be able to defy at once the open attacks of the other departments of the government, and the more dangerous, because impalpable, seductions of popular sentiment.

Does it possess, has it displayed, this strength and stability?

It has not always followed its own former decisions. This is natural in a court whose errors cannot be cured by the intervention of the legislature. The English final court of appeal always follows its previous decisions, though high authorities have declared that cases may be imagined in which it would refuse to do so. And that court (the House of Lords) can afford so to adhere, because, when an old decision begins to be condemned, Parliament can forthwith alter the law. But as nothing less than a constitutional amendment can alter the law contained in the Federal Constitution, the Supreme Court must choose between the evil of unsettling the law by reversing, and the evil of perpetuating bad law by following, a former decision. It may reasonably, in extreme cases, deem the latter evil the greater.

The Supreme Court feels the touch of public opinion. Opinion is stronger in America than anywhere else in the world, and judges are only men. To yield a little may be prudent, for the tree that cannot bend to the blast may be broken. There is, moreover, this ground at least for presuming public opinion to be right, that through it the progressive judgment of the world is expressed. Of course, whenever the law is clear, because the words of the Constitution are plain or the cases interpreting them decisive on the point raised, the court must look solely to those words and cases, and cannot permit any other consideration to affect its mind. But when the terms of the Constitution admit of more than one construction, and when previous decisions have left the true construction so far

open that the point in question may be deemed new, is a court to be blamed if it prefers the construction which the bulk of the people deem suited to the needs of the time? A court is sometimes so swayed consciously, more often unconsciously, because the pervasive sympathy of numbers is irresistible even by elderly lawyers.

The Supreme Court has changed its colour, *i.e.* its temper and tendencies, from time to time, according to the political proclivities of the men who composed it. It changes very slowly, because the vacancies in a small body happen rarely, and its composition therefore often represents the predominance of a past and not of the presently ruling party. From 1789 down till the death of Chief-Justice Marshall in 1835 its tendency was to the extension of the powers of the Federal government, and therewith of its own jurisdiction, because the ruling spirits in it were men who belonged to the old Federalist party, though that party fell in 1800, and disappeared in 1814. From 1835 till the War of Secession its sympathies were with the doctrines of the Democratic party. Without actually abandoning the positions of the previous period, the court, during these years when Chief-Justice Taney presided over it, leant against any further extension of Federal power or of its own jurisdiction. During and after the war, when the ascendency of the Republican party had begun to change the composition of the court, a third period opened. Centralizing ideas were again powerful: the vast war powers asserted by Congress were in most instances supported by judicial decision, the rights of States while maintained (as in the Granger cases) as against private persons or bodies, were for a time regarded with less favour whenever they seemed to conflict with those of the Federal government. In none of these three periods can the judges be charged with any prostitution of their functions to party purposes. Their action flowed naturally from the habits of thought they had formed before their accession to the bench, and from the sympathy they could not but feel with the doctrines on whose behalf they had contended.

The Fathers of the Constitution studied nothing more than to secure the complete independence of the judiciary. The President was not permitted to remove the judges, nor Congress to diminish their salaries. One thing only was either forgotten

or deemed undesirable, because highly inconvenient, to determine, — the number of judges in the Supreme Court. Here was a weak point, a joint in the court's armour through which a weapon might some day penetrate. Congress having in 1801, pursuant to a power contained in the Constitution, established sixteen Circuit courts, President Adams, immediately before he quitted office, appointed members of his own party to the justiceships thus created. When President Jefferson came in, he refused to admit the validity of the appointments; and the newly elected Congress, which was in sympathy with him, abolished the Circuit courts themselves, since it could find no other means of ousting the new justices. This method of attack, whose constitutionality has been much doubted, cannot be used against the Supreme Court, because that tribunal is directly created by the Constitution. But as the Constitution does not prescribe the number of justices, a statute may increase or diminish the number as Congress thinks fit.

In 1866, when Congress was in fierce antagonism to President Johnson, and desired to prevent him from appointing any judges, it reduced the number, which was then ten, by a statute providing that no vacancy should be filled up till the number was reduced to seven. In 1869, when Johnson had been succeeded by Grant, the number was raised to nine, and presently the altered court allowed the question of the validity of the Legal Tender Act, just before determined, to be reopened. This method is plainly susceptible of further and possibly dangerous application. Suppose a Congress and President bent on doing something which the Supreme Court deems contrary to the Constitution. They pass a statute. A case arises under it. The court on the hearing of the case unanimously declares the statute to be null, as being beyond the powers of Congress. Congress forthwith passes and the President signs another statute more than doubling the number of the justices. The President appoints to the new justiceships men who are pledged to hold the former statute constitutional. The Senate confirms his appointments. Another case raising the validity of the disputed statute is brought up to the court. The new justices outvote the old ones: the statute is held valid: the security provided for the protection of the Constitution is gone like a morning mist.

What prevents such assaults on the fundamental law — assaults which, however immoral in substance, would be perfectly legal in form? Not the mechanism of government, for all its checks have been evaded. Not the conscience of the legislature and the President, for heated combatants seldom shrink from justifying the means by the end. Nothing but the fear of the people, whose broad good sense and attachment to the great principles of the Constitution may generally be relied on to condemn such a perversion of its forms. Yet if excitement has risen high over the country, a majority of the people may acquiesce; and then it matters little whether what is really a revolution be accomplished by openly violating or by merely distorting the forms of law. To the people we come sooner or later: it is upon their wisdom and self-restraint that the stability of the most cunningly devised scheme of government will in the last resort depend.

CHAPTER XXIV

COMPARISON OF THE AMERICAN AND EUROPEAN SYSTEMS

The greatest problem that free peoples have to solve is how to enable the citizens at large to conduct or control the executive business of the state. England was in 1787 the only nation (the cantons of Switzerland were so small as scarcely to be thought of) that had solved this problem, first, by the development of a representative system, secondly, by giving to her representatives a large authority over the executive. The Constitutional Convention, therefore, turned its eyes to her when it sought to constitute a free government for the new nation which the "more perfect union" of the States was calling into conscious being.

They conceived that such freedom and excellence as the British Constitution possessed depended largely on the separation of the legislature from the executive, as this secured the independence of the former. They held, however, that in Britain the Crown was always endeavouring unduly to influence Parliament and was itself excessive. These views tallied with and were strengthened by the ideas and habits formed in the Americans by their experience of representative government in the colonies, ideas and habits which were after all the dominant factor in the construction of their political system. In these colonies the executive power had been vested either in governors sent from England by the Crown, or in certain proprietors, to whom the English Crown had granted hereditary rights in a province. Each representative assembly, while it made laws and voted money for the purposes of its respective commonwealth, did not control the governor, because his commission issued from the British Crown and he was responsible thereto. A governor had no parliamentary cabinet, but only officials responsible to himself and the Crown. His veto on acts of the colonial legislature was fre-

quently used; and that body, with no means of influencing his conduct other than the refusal to vote money, was a legislature and nothing more. Thus the Americans found and admired in their colonial (or State) systems a separation of the legislative from the executive branch, more complete than in England; and being already proud of their freedom, they attributed its amplitude chiefly to this cause.

From their colonial and State experience, coupled with their notions of the British Constitution, the men of 1787 drew three conclusions: First, that the vesting of the executive and the legislative powers in different hands was the normal and natural feature of a free government. Secondly, that the power of the executive was dangerous to liberty, and must be kept within well-defined boundaries. Thirdly, that in order to check the head of the state it was necessary not only to define his powers, and appoint him for a limited period, but also to destroy his opportunities of influencing the legislature. Conceiving that ministers, as named by and acting under the orders of the President, would be his instruments rather than faithful representatives of the people, they resolved to prevent them from holding this double character, and therefore forbade "any person holding office under the United States" to be a member of either House. They deemed that in this way they had rendered their legislature pure, independent, vigilant, the servant of the people, the foe of arbitrary power.

Omnipotent, however, the framers of the Constitution did not mean to make it. They were sensible of the opposite dangers which might flow from a feeble and dependent executive. The proposal made in the first draft of the Constitution that Congress should elect the President, was abandoned, lest he should be merely its creature and unable to check it. To strengthen his position, and prevent intrigues among members of Congress for this supreme office, it was settled that the people should themselves, through certain electors appointed for the purpose, choose the President. By giving him the better status of a popular, though indirect, mandate, he became independent of Congress, and was encouraged to use his veto, which a mere nominee of Congress might have hesitated to do. Thus it was believed in 1787 that a due balance had been arrived at, the independence of Congress being secured on the one side and

the independence of the President on the other. Each power holding the other in check, the people, jealous of their hardly won liberties, would be courted by each, and safe from the encroachments of either.

There was of course the risk that controversies as to their respective rights and powers would arise between these two departments. But the creation of a court entitled to place an authoritative interpretation upon the Constitution in which the supreme will of the people was expressed, provided a remedy available in many, if not in all, of such cases, and a security for the faithful observance of the Constitution which England did not, and under her system of an omnipotent Parliament could not, possess.

"They builded better than they knew." They divided the legislature from the executive so completely as to make each not only independent, but weak even in its own proper sphere. The President was debarred from carrying Congress along with him, as a popular prime minister may carry Parliament in England, to effect some sweeping change. He is fettered in foreign policy, and in appointments, by the concurrent rights of the Senate. He is forbidden to appeal at a crisis from Congress to the country. Nevertheless his office retains a measure of solid independence in the fact that the nation regards him as a direct representative and embodiment of its majesty, while the circumstance that he holds office for four years only, makes it possible for him to do acts of power during those four years which would excite alarm from a permanent sovereign. Entrenched behind the ramparts of a rigid Constitution, he has retained rights of which his prototype the English king has been gradually stripped. Congress on the other hand was weakened, as compared with the British Parliament in which one House has become dominant, by its division into two coequal Houses, whose disagreement paralyzes legislative action. And it lost that direct control over the executive which the presence of ministers in the legislature, and their dependence upon a majority of the popular House, give to the Parliaments of Britain and her colonies. It has diverged widely from the English original which it seemed likely, with only a slight difference, to reproduce.

The British House of Commons has grown to the stature of

a supreme executive as well as legislative council, acting not only by its properly legislative power, but through its right to displace ministers by a resolution of want of confidence, and to compel the sovereign to employ such servants as it approves. Congress remains a pure legislature, unable to displace a minister, unable to choose the agents by whom its laws are to be carried out, and having hitherto failed to develop that internal organization which a large assembly needs in order to frame and successfully pursue definite schemes of policy. Nevertheless, so far-reaching is the power of legislation, Congress has encroached, and may encroach still farther, upon the sphere of the executive. It encroaches not merely with a conscious purpose, but because the law of its being has forced it to create in its committees bodies whose expansion necessarily presses on the executive. It encroaches because it is restless, unwearied, always drawn by the progress of events into new fields of labour.

It is worth while to compare the form which a constitutional struggle takes under the cabinet system and under that of America.

In England, if the executive ministry displeases the House of Commons, the House passes an adverse vote. The ministry have their choice to resign or dissolve Parliament. If they resign, a new ministry is appointed from the party which has proved itself strongest in the House of Commons; and co-operation being restored between the legislature and the executive, public business proceeds. If, on the other hand, the ministry dissolve Parliament, a new Parliament is sent up which, if favourable to the existing Cabinet, keeps them in office, if unfavourable, dismisses them forthwith. Accord is in either case restored. Should the difference arise between the House of Lords and a ministry supported by the House of Commons, and the former persist in rejecting a bill which the Commons send up, a dissolution is the usual remedy; and if the newly elected House of Commons reasserts the view of its predecessor, the Lords, according to the now recognized constitutional practice, yield at once. Should they, however, still stand out, there remains the extreme expedient, threatened in 1832, but never yet resorted to, of a creation by the sovereign (*i.e.* the ministry) of new peers sufficient to turn the balance of votes in the Upper

House. Practically the ultimate decision always rests with the people, that is to say, with the party which for the moment commands a majority of electoral votes. This method of cutting knots applies to all differences that can arise between executive and legislature. It is a swift and effective method; in this swiftness and effectiveness lie its dangers as well as its merits.

In America a dispute between the President and Congress may arise over an executive act or over a bill. If over an executive act, an appointment or a treaty, one branch of Congress, the Senate, can check the President, that is, can prevent him from doing what he wishes, but cannot make him do what they wish. If over a bill which the President has returned to Congress unsigned, the two Houses can, by a two-thirds majority, pass it over his veto, and so end the quarrel; though the carrying out of the bill in its details must be left to him and his ministers, whose dislike of it may render them unwilling and therefore unsuitable agents. Should there not be a two-thirds majority, the bill drops; and however important the question may be, however essential to the country some prompt dealing with it, either in the sense desired by the majority of Congress or in that preferred by the President, nothing can be done till the current term of Congress expires. The matter is then remitted to the people. If the President has still two more years in office, the people may signify their approval of his policy by electing a House in political agreement with him, or disapprove it by re-electing a hostile House. If the election of a new President coincides with that of the new House, the people have a second means provided of expressing their judgment. They may choose not only a House of the same or an opposite complexion to the last, but a President of the same or an opposite complexion. Anyhow they can now establish accord between one House of Congress and the executive.[1] The Senate, however, may still remain opposed to the President,

[1] It is of course possible that the people may elect at the same time a President belonging to one party and a House the majority whereof belongs to the other party. This happened in 1848, and again in 1876, when, however, the presidential election was disputed. It is rendered possible by the fact that the President is elected on a different plan from the House, the smaller States having relatively more weight in a presidential election, and the presidential electors being now chosen, in nearly every State, by "general ticket," not in districts.

and may not be brought into harmony with him until a sufficient time has elapsed for the majority in it to be changed by the choice of new senators by the State legislatures. This is a slower method than that of Britain. It may fail in a crisis needing immediate action; but it escapes the danger of a hurried and perhaps irrevocable decision.

Englishmen deem it a merit in their system that the practical executive of the country is directly responsible to the House of Commons. In the United States, however, not only in the National government, but in every one of the States, the opposite doctrine prevails—that the executive should be wholly independent of the legislative branch. Americans understand that this scheme involves a loss of power and efficiency, but they believe that it makes greatly for safety in a popular government. They expect the executive and the legislature to work together as well as they can, and public opinion does usually compel a degree of co-operation and efficiency which perhaps could not be expected theoretically. It is an interesting commentary on the tendencies of democratic government, that in America reliance is coming to be placed more and more, in the nation, in the State, and in the city, upon the veto of the executive as a protection to the community against the legislative branch. Weak executives frequently do harm, but a strong executive has rarely abused popular confidence. On the other hand, instances where the executive, by the use of his veto power, has arrested mischiefs due to the action of the legislature are by no means rare. This circumstance leads some Americans to believe that the day is not far distant when in England some sort of veto power, or other constitutional safeguard, must be interposed to protect the people against a hasty decision of their representatives.

While some bid England borrow from her daughter, other Americans conceive that the separation of the legislature from the executive has been carried too far in the United States, and suggest that it would be an improvement if the ministers of the President were permitted to appear in both Houses of Congress to answer questions, perhaps even to join in debate. I have no space to discuss the merits of this proposal, which no doubt derives support from the "particularistic" tendencies of Congress, in which there is no group of persons bound, like

a British ministry, to maintain the interests of the country as a whole. But I must observe that it might lead to changes more extensive than its advocates seem to contemplate. The more the President's ministers come into contact with Congress, the more difficult will it be to maintain the independence of Congress which he and they now possess. It is hard to say, when one begins to make alterations in an old house, how far one will be led on in rebuilding, and I doubt whether this change in the present American system, possibly in itself desirable, might not be found to involve a reconstruction large enough to put a new face upon several parts of that system.

In the history of the United States there have been four serious conflicts between the legislature and the executive. The first was that between President Jackson and Congress. It ended in Jackson's favour, for he got his way; but he prevailed because during the time when both Houses were against him, his opponents had not a two-thirds majority. In the latter part of the struggle the (re-elected) House was with him; and before he had quitted office his friends obtained a majority in the always-changing Senate. But his success was not so much the success of the executive office as of a particular President popular with the masses. The second contest, which was between President Tyler and both Houses of Congress, was a drawn battle, because the majority in the Houses fell short of two-thirds. In the third, between President Johnson and Congress, Congress prevailed; the enemies of the President having, owing to the disfranchisement of most Southern States, an overpowering majority in both Houses, and by that majority carrying over his veto a series of acts so peremptory that even his reluctance to obey them could not destroy, though it sometimes marred, their efficiency. In the fourth case, referred to in a previous chapter, the victory remained with the President, because the congressional majority against him was slender. But a presidential victory is usually a negative victory. It consists not in his getting what he wants, but in his preventing Congress from getting what it wants.[1]

[1] In the famous case of President Jackson's removal of the government deposits of money from the United States Bank, the President did accomplish his object. But this was a very exceptional case, being one which had remained within the executive discretion of the President, since no statute had happened to provide for it.

The practical result of the American arrangements thus comes to be that when one party possesses a large majority in Congress it can overpower the President, taking from him all but a few strictly reserved functions, such as those of pardoning, of making promotions in the army and navy, and of negotiating (not of concluding treaties, for these require the assent of the Senate) with foreign States. Where parties are pretty equally divided, *i.e.* when the majority is one way in the Senate, the other way in the House, or when there is only a small majority against the President in both Houses, the President is in so far free that new fetters cannot be laid upon him; but he must move under those which previous legislation has imposed, and can take no step for which new legislation is needed.

It is another and a remarkable consequence of the absence of cabinet government in America, that there is also no party government in the European sense. Party government in France, Italy, and England means, that one set of men, united, or professing to be united, by holding one set of opinions, have obtained control of the whole machinery of government, and are working it in conformity with those opinions. Their majority in the country is represented by a majority in the legislature, and to this majority the ministry of necessity belongs. The ministry is the supreme committee of the party, and controls all the foreign as well as domestic affairs of the nation, because the majority is deemed to be the nation. It is otherwise in America. Men do, no doubt, talk of one party as being "in power," meaning thereby the party to which the then President belongs. But they do so because that party enjoys the spoils of office, in which to so many politicians the value of power consists. They do so also because in the early days the party which prevailed in the legislative usually prevailed also in the executive department, and because the presidential election was, and still is, the main struggle which proclaimed the predominance of one or other party.[1]

But the Americans, when they speak of the administration

[1] The history of the Republic divides itself in the mind of most Americans into a succession of Presidents and administrations, just as old-fashioned historians divided the history of England by the reigns of kings, a tolerable way of reckoning in the days of Edward the Third and Richard the Second, when the personal gifts of the sovereign were a chief factor in affairs, but absurd in the days of George the Fourth and William the Fourth.

party as the party in power, have, in borrowing an English phrase, applied it to utterly different facts. Their "party in power" need have no "power" beyond that of securing places for its adherents. It may be in a minority in one House of Congress, in which event it accomplishes nothing, but can at most merely arrest adverse legislation, or in a small minority in both Houses of Congress, in which event it must submit to see many things done which it dislikes. And if its enemies control the Senate, even its executive arm is paralyzed. Though party feeling has generally been stronger in America than in England, and even now covers a larger proportion of the voters, and enforces a stricter discipline, party government is distinctly weaker.

We are now in a position to sum up the practical results of the scheme which purports to separate Congress from the executive, instead of uniting them as they are united under a cabinet government. They are five:—

The President and his ministers have no initiative in Congress, little influence over Congress, except what they can exert upon individual members, through the bestowal of patronage.

Congress has, together with unlimited powers of inquiry, imperfect powers of control over the administrative departments.

The nation does not always know how or where to fix responsibility for misfeasance or neglect. The person and bodies concerned in making and executing the laws are so related to one another that each can generally shift the burden of blame on some one else, and no one acts under the full sense of direct accountability.

There is a loss of force by friction — *i.e.* part of the energy, force, and time of the men and bodies that make up the government is dissipated in struggles with one another. This belongs to all free governments, because all free governments rely upon checks. But the more checks, the more friction.

There is a risk that executive vigour and promptitude may be found wanting at critical moments.

We may include these defects in one general expression. There is in the American government, considered as a whole, a want of unity. Its branches are unconnected; their efforts are not directed to one aim, do not produce one harmonious result. The sailors, the helmsman, the engineer, do not seem to have one purpose or obey one will, so that instead of making steady way the vessel may pursue a devious or zigzag course, and sometimes merely turn round and round in the water. The more closely any one watches from year to year the history of free governments, and himself swims in the deep-eddying time current, the more does he feel that current's force, so that human foresight and purpose seem to count for little, and ministers and parliaments to be swept along they know not whither by some overmastering fate or overruling providence. But this feeling is stronger in America than in Europe, because in America such powers as exist act with little concert and resign themselves to a conscious impotence. Clouds arise, blot out the sun overhead, and burst in a tempest; the tempest passes, and leaves the blue above bright as before, but at the same moment other clouds are already beginning to peer over the horizon. Parties are formed and dissolved, compromises are settled and assailed and violated, wars break out and are fought through and forgotten, new problems begin to show themselves, and the civil powers, Presidents, and Cabinets, and State governments, and Houses of Congress, seem to have as little to do with all these changes, as little ability to foresee or avert or resist them, as the farmer, who sees approaching the tornado which will uproot his crop, has power to stay its devastating course.

A President can do little, for he does not lead either Congress or the nation. Congress cannot guide or stimulate the President, nor replace him by a man fitter for the emergency. The Cabinet neither receive a policy from Congress nor give one to it. Each power in the State goes its own way, or wastes precious moments in discussing which way it shall go, and that which comes to pass seems to be a result not of the action of the legal organs of the State, but of some larger force which at one time uses their discord as its means, at another neglects them altogether. This at least is the impression which the history of the greatest problem and greatest struggle that

America has seen, the struggle of the slaveholders against the Free Soil and Union party, culminating in the War of the Rebellion, makes upon one who looking back on its events sees them all as parts of one drama. Inevitable the struggle may have been; and in its later stages passion had grown so hot, and the claims of the slaveholders so extravagant, that possibly under no scheme of government — so some high American authorities hold — could a peaceful solution have been looked for. Yet it must be remembered that the carefully devised machinery of the Constitution did little to solve that problem or avert that struggle, while the system of divided and balanced and limited powers, giving every advantage to those who stood by the existing law, and placing the rights of the States behind the bulwarks of an almost unalterable instrument, may have tended to aggravate the spirit of uncompromising resistance. The nation asserted itself at last, but not till the resources which the Constitution provided for the attainment of a peaceful solution had irretrievably failed.

This want of unity is painfully felt in a crisis. When a sudden crisis comes upon a free State, the executive needs two things, a large command of money and powers in excess of those allowed at ordinary times. Under the European system the duty of meeting such a crisis is felt to devolve as much on the representative Chamber as on the ministers who are its agents. The Chamber is therefore at once appealed to for supplies, and for such legislation as the occasion demands. When these have been given, the ministry moves on with the weight of the people behind it; and as it is accustomed to work at all times with the Chamber, and the Chamber with it, the piston plays smoothly and quickly in the cylinder. In America the President has at ordinary times little to do with Congress, while Congress is unaccustomed to deal with executive questions. Its machinery, and especially the absence of ministerial leaders and consequent want of organization, unfit it for promptly confronting practical troubles. It is apt to be sparing of supplies, and of that confidence which doubles the value of supplies. Jealousies of the executive, which are proper in quiet times and natural towards those with whom Congress has little direct intercourse, may now be perilous, yet how is Congress to trust persons not members of its own body

nor directly amenable to its control? When dangers thicken the only device may be the Roman one of a temporary dictatorship. Something like this happened in the War of Secession, for the powers then conferred upon President Lincoln, or exercised without congressional censure by him, were almost as much in excess of those enjoyed under the ordinary law as the authority of a Roman dictator exceeded that of a Roman consul.[1] Fortunately the habits of legality, which lie deep in the American as they did in the Roman people, reasserted themselves after the war was over, as they were wont to do at Rome in her earlier and better days. When the squall had passed the ship righted, and she has pursued her subsequent course on as even a keel as before.

The defects of the tools are the glory of the workman. The more completely self-acting is the machine, the smaller is the intelligence needed to work it; the more liable it is to derangement, so much greater must be the skill and care applied by one who tends it. The English Constitution, which we admire as a masterpiece of delicate equipoises and complicated mechanism would anywhere but in England be full of difficulties and dangers. It stands and prospers in virtue of the traditions that still live among English statesmen and the reverence that has ruled English citizens. It works by a body of understandings which no writer can formulate, and of habits which centuries have been needed to instil. So the American people have a practical aptitude for politics, a clearness of vision and capacity for self-control never equalled by any other nation. In 1861 they brushed aside their darling legalities, allowed the executive to exert novel powers, passed lightly laws whose constitutionality remains doubtful, raised an enormous army, and contracted a prodigious debt. Romans could not have been more energetic in their sense of civic duty, nor more trustful to their magistrates. When the emergency had passed away the torrent which had overspread the plain fell back at once into its safe and well-worn channel. The reign of legality returned; and only four years after the power of the executive had reached its highest point in the hands of President Lincoln, it was reduced to its lowest point in those of Presi-

[1] For Lincoln's argument respecting his use of extraordinary powers, see note to Chapter XXXII., *post*.

dent Johnson. Such a people can work any constitution. The danger for them is that this reliance on their skill and their star may make them heedless of the faults of their political machinery, slow to devise improvements which are best applied in quiet times.

CHAPTER XXV

GENERAL OBSERVATIONS ON THE FRAME OF NATIONAL GOVERNMENT

THE account which has been so far given of the working of the American government has been necessarily an account rather of its mechanism than of its spirit. Its practical character, its temper and colour, so to speak, largely depend on the party system by which it is worked, and on what may be called the political habits of the people. These will be described in later chapters. Here, however, before quitting the study of the constitutional organs of government, it is well to sum up the criticisms we have been led to make, and to add a few remarks, for which no fitting place could be found in preceding chapters, on the general features of the National government.

I. No part of the Constitution cost its framers so much time and trouble as the method of choosing the President. They saw the evils of a popular vote. They saw also the objections to placing in the hands of Congress the election of a person whose chief duty it was to hold Congress in check. The plan of having him selected by judicious persons, specially chosen by the people for that purpose, seemed to meet both difficulties, and was therefore recommended with confidence. The presidential electors have, however, turned out mere ciphers, and the President is practically chosen by the people at large. The only importance which the elaborate machinery provided in the Constitution retains, is that it prevents a simple popular vote in which the majority of the nation should prevail, and makes the issue of the election turn on the voting in certain "pivotal" States.

II. The choice of the President, by what is now practically a simultaneous popular vote, not only involves once in every four years a tremendous expenditure of energy, time, and

money, but induces of necessity a crisis which, if it happens to coincide with any passion powerfully agitating the people, may be dangerous to the commonwealth.

III. There is always a risk that the result of a presidential election may be doubtful or disputed on the ground of error, fraud, or violence. When such a case arises, the difficulty of finding an authority competent to deal with it, and likely to be trusted, is extreme. Moreover, the question may not be settled until the pre-existing executive has, by effluxion of time, ceased to have a right to the obedience of the citizens. The experience of the election of 1876 illustrates these dangers.

IV. The change of the higher executive officers, and of many of the lower executive officers also, which usually takes place once in four years, gives a jerk to the machinery, and causes a discontinuity of policy, unless, of course, the President has served only one term, and is re-elected. Moreover, there is generally a loss either of responsibility or of efficiency in the executive chief magistrate during the last part of his term. An outgoing President may possibly be a reckless President, because he has little to lose by misconduct, little to hope from good conduct. He may therefore abuse his patronage, or gratify his whims with impunity. But more often he is a weak President. He has little influence with Congress, because his patronage will soon come to an end, little hold on the people, who are already speculating on the policy of his successor. His secretary of state cannot treat boldly with foreign powers, who perceive that he has a diminished influence in the Senate, and know that the next secretary may have different views.

The question whether the United States, which no doubt needed a President in 1789 to typify the then created political unity of the nation, might not now dispense with one, has never been raised in America, where the people, though dissatisfied with the method of choice, value the office because it is independent of Congress and directly responsible to the people. Americans condemn any plan under which, as lately befell in France, the legislature can drive a President from power and itself proceed to choose a new one.

V. The Vice-President's office is ill-conceived. His only

ordinary function is to act as chairman of the Senate, but as he does not appoint the committees of that House, and has not even a vote (expect a casting vote) in it, this function is of little moment. If, however, the President dies, or becomes incapable of acting, or is removed from office, the Vice-President succeeds to the Presidency. What is the result? The place being in itself unimportant, the choice of a candidate for it excites little interest, and is chiefly used by the party managers as a means of conciliating a section of their party. It becomes what is called "a complimentary nomination." The man elected Vice-President is therefore never a man in the front rank. But when the President dies during his term of office, which has happened to four out of the eighteen Presidents, this second-class man steps into a great place for which he was never intended. Sometimes, as in the case of Mr. Arthur, he fills the place respectably. Sometimes, as in that of Andrew Johnson, he throws the country into confusion.

He is *aut nullus aut Cæsar*.

VI. The defects in the structure and working of Congress, and in its relations to the executive, have been so fully dwelt on already that it is enough to refer summarily to them. They are —

The discontinuity of congressional policy.
The want of adequate control over officials.
The want of opportunities for the executive to influence the legislature.
The want of any authority charged to secure the passing of such legislation as the country needs.
The frequency of disputes between three co-ordinate powers, the President, the Senate, and the House.

The maintenance of a continuous policy is a difficulty in all popular governments. In the United States it is specially so, because —

The executive head and his ministers are necessarily (unless when a President is re-elected) changed once every four years.
One House of Congress is changed every two years.
Neither House recognizes permanent leaders.
No accord need exist between Congress and the executive.

There is no such thing as a party in power, in the European sense of the term, because the party to which the executive belongs may be in a minority in one or both Houses of Congress, in which case it cannot do anything which requires fresh legislation, — may be in a minority in the Senate, in which case it can take no administrative act of importance.

There is little true leadership in political action, because the most prominent man has no recognized party authority. Congress was not elected to support him. He cannot threaten disobedient followers with a dissolution of Parliament like an English prime minister. He has not even the French President's right of dissolving the House with the consent of the Senate.

There is often no general and continuous Cabinet policy, because the Cabinet has no authority over Congress, may perhaps have no influence with it.

These defects are all reducible to two. There is an excessive friction in the American system, a waste of force in the strife of various bodies and persons created to check and balance one another. There is a want of executive unity, and therefore a possible want of executive vigour. Power is so much subdivided that it is hard at a given moment to concentrate it for prompt and effective action. In fact, this happens only when a distinct majority of the people are so clearly of one mind that the several co-ordinate organs of government obey this majority, uniting their efforts to serve its will.

VII. There are four essentials to the excellence of a representative system: —

That the representatives shall be chosen from among the best men of the country, and, if possible, from its natural leaders.

That they shall be strictly and palpably responsible to their constituents for their speeches and votes.

That they shall have courage enough to resist a momentary impulse of their constituents which they think mischievous, *i.e.* shall be representatives rather than mere delegates.

That they individually, and the chamber they form, shall

> have a reflex action on the people, *i.e.* that while they derive authority from the people, they shall also give the people the benefit of the experience they acquire in the chamber, as well as of the superior knowledge and capacity they may be presumed to possess.

Americans hold, and no doubt correctly, that of these four requisites, the first, third, and fourth are not attained in their country. Congressmen are not chosen from among the best citizens. They mostly deem themselves mere delegates. They do not pretend to lead the people, being indeed seldom specially qualified to do so.

That the second requisite, responsibility, is not fully realized seems surprising in a democratic country, and indeed almost inconsistent with that conception of the representative as a delegate, which is supposed, perhaps erroneously, to be characteristic of democracies. Still the fact is there. One cause, already explained, is to be found in the committee system. Another is the want of organized leadership in Congress. In Europe, a member's responsibility takes the form of his being bound to support the leader of his party on all important divisions. In America, this obligation attaches only when the party has "gone into caucus," and there resolved upon its course. Not having the right to direct, the leader cannot be held responsible for the action of the rank and file. As a third cause we may note the fact that owing to the restricted competence of Congress many of the questions which chiefly interest the voter do not come before Congress at all, so that its proceedings are not followed with that close and keen attention which the debates and divisions of European chambers excite.

In general the reciprocal action and reaction between the electors and Congress, what is commonly called the "touch" of the people with their agents, is not sufficiently close, quick, and delicate. Representatives ought to give light and leading to the people, just as the people give stimulus and momentum to their representatives. This incidental merit of the parliamentary system is among its greatest merits. But in America the action of the voter fails to tell upon Congress. He votes for a candidate of his own party, but he does not convey to that

candidate an impulse towards the carrying of particular measures, because the candidate when in Congress will be practically unable to promote those measures, unless he happens to be placed on the committee to which they are referred. Hence the citizen, when he casts his ballot, can seldom feel that he is advancing any measure or policy, except the vague and general policy indicated in his party platform. He is voting for a party, but he does not know what the party will do, and for a man, but a man whom chance may deprive of the opportunity of advocating the measures he cares most for.

Conversely, Congress does not guide and illuminate its constituents. It is amorphous, and has little initiative. It does not focus the light of the nation, does not warm its imagination, does not dramatize principles in the deeds and characters of men.[1] This happens because, in ordinary times, it lacks great leaders, and the most obvious cause why it lacks them, is its disconnection from the executive. As it is often devoid of such men, so neither does the country habitually come to it to look for them. In the old days, neither Hamilton, nor Jefferson, nor John Adams; in our own time, neither Stanton, nor Grant, nor Tilden, nor Cleveland, ever sat in Congress. Lincoln sat for two years only, and owed little of his subsequent eminence to his career there.

VIII. The independence of the judiciary, due to its holding for life, has been a conspicuous merit of the Federal system, as compared with the popular election and short terms of judges in most of the States. Yet even the Federal judiciary is not secure from the attacks of the two other powers, if combined. For the legislature may by statute increase the number of Federal justices, increase it to any extent, since the Constitution leaves the number undetermined, and the President may appoint persons whom he knows to be actuated by a particular political bias, perhaps even prepared to decide specific questions in a particular sense. Thus he and Congress

[1] As an illustration of the want of the dramatic element in Congress, I may mention that some at least of the parliamentary debating societies in the American colleges (colleges for women included) take for their model not either House of Congress but the British House of Commons, the students conducting their debates under the names of prominent members of that assembly. They say that they do this because Congress has no ministry and no leaders of the Opposition.

together may obtain such a judicial determination of any constitutional question as they join in desiring, even although that question has been heretofore differently decided by the Supreme Court. The only safeguard is in the disapproval of the people.

All the main features of American government may be deduced from two principles. One is the sovereignty of the people, which expresses itself in the fact that the supreme law — the Constitution — is the direct utterance of their will, that they alone can amend it, that it prevails against every other law, that whatever powers it does not delegate are deemed to be reserved to it, that every power in the State draws its authority, whether directly, like the House of Representatives, or in the second degree, like the President and the Senate, or in the third degree, like the Federal judiciary, from the people, and is legally responsible to the people, and not to any one of the other powers.

The second principle, itself a consequence of this first one, is the distrust of the various organs and agents of government. The States are carefully safeguarded against aggression by the central government. So are the individual citizens. Each organ of government, the executive, the legislature, the judiciary, is made a jealous observer and restrainer of the others. Since the people, being too numerous, cannot directly manage their affairs, but must commit them to agents, they have resolved to prevent abuses by trusting each agent as little as possible, and subjecting him to the oversight of other agents, who will harass and check him if he attempts to overstep his instructions.

Every Constitution, like every man, has "the defects of its good qualities." If a nation desires perfect stability it must put up with a certain slowness and cumbrousness; it must face the possibility of a want of action where action is called for. If, on the other hand, it seeks to obtain executive speed and vigour by a complete concentration of power, it must run the risk that power will be abused and irrevocable steps too hastily taken. "The liberty-loving people of every country," says Judge Cooley,[1] "take courage from American freedom, and

[1] Address to the South Carolina Bar Association, December 1886.

find augury of better days for themselves from American prosperity. But America is not so much an example in her liberty as in the covenanted and enduring securities which are intended to prevent liberty degenerating into licence, and to establish a feeling of trust and repose under a beneficent government, whose excellence, so obvious in its freedom, is still more conspicuous in its careful provision for permanence and stability." Those faults on which I have laid stress, the waste of power by friction, the want of unity and vigour in the conduct of affairs by executive and legislature, are the price which the Americans pay for the autonomy of their States, and for the permanence of the equilibrium among the various branches of their government. They pay this price willingly, because these defects are far less dangerous to the body politic than they would be in a European country. Take for instance the shortcomings of Congress as a legislative authority. Every European country is surrounded by difficulties which legislation must deal with, and that promptly. But in America, where those relics of mediæval privilege and injustice that still cumber most parts of the Old World either never existed, or were long ago abolished, where all the conditions of material prosperity exist in ample measure, and the development of material resources occupies men's minds, where nearly all social reforms lie within the sphere of State action, — in America there is less need and less desire than in Europe for a perennial stream of Federal legislation. People are contented if things go on fairly well as they are. Political philosophers, or philanthropists, perceive not a few improvements which Federal statutes might effect, but the mass of the nation does not complain, and the wise see Congress so often on the point of committing mischievous errors that they do not deplore the barrenness of session after session.

Every European State has to fear not only the rivalry but the aggression of its neighbours. Even Britain, so long safe in her insular home, has lost some of her security by the growth of steam navies, and has in her Indian and colonial possessions given pledges to Fortune all over the globe. She, like the Powers of the European continent, must maintain her system of government in full efficiency for war as well as for peace, and cannot afford to let her armaments decline,

her finances become disordered, the vigour of her executive authority be impaired, sources of internal discord continue to prey upon her vitals. But America lives in a world of her own. Safe from attack, safe even from menace, she hears from afar the warring cries of European races and faiths.

Had Canada or Mexico grown to be a great power, had France not sold Louisiana, or had England, rooted on the American continent, become a military despotism, the United States could not indulge the easy optimism which makes them tolerate the faults of their government. As it is, that which might prove to a European State a mortal disease is here nothing worse than a teasing ailment. Since the War of Secession ended, no serious danger has arisen either from within or from without to alarm American statesmen. Social convulsions from within, warlike assaults from without, seem now as unlikely to try the fabric of the American Constitution as an earthquake to rend the walls of the Capitol. This is why the Americans submit, not merely patiently but hopefully, to the defects of their government. The vessel may not be any better built, or found, or rigged than are those which carry the fortunes of the great nations of Europe. She is certainly not better navigated. But for the present at least — it may not always be so — she sails upon a summer sea.

It must never be forgotten that the main object which the framers of the Constitution set before themselves has been achieved. When Siéyès was asked what he had done during the Reign of Terror, he answered, "I lived." The Constitution as a whole has stood and stands unshaken. The scales of power have continued to hang fairly even. The President has not corrupted and enslaved Congress: Congress has not paralyzed and cowed the President. The legislative may have gained somewhat on the executive department; yet were George Washington to return to earth, he might be as great and useful a President as he was a century ago. Neither the legislature nor the executive has for a moment threatened the liberties of the people. The States have not broken up the Union, and the Union has not absorbed the States. No wonder that the Americans are proud of an instrument under which this great result has been attained, which has passed unscathed through the furnace of civil war, which has been found capable

of embracing a body of commonwealths more than three times as numerous, and with twenty-fold the population of the original States, which has cultivated the political intelligence of the masses to a point reached in no other country, which has fostered and been found compatible with a larger measure of local self-government than has existed elsewhere. Nor is it the least of its merits to have made itself beloved. Objections may be taken to particular features, and these objections point, as most American thinkers are agreed, to practical improvements which would preserve the excellences and remove some of the inconveniences. But reverence for the Constitution has become so potent a conservative influence, that no proposal of fundamental change seems likely to be entertained. And this reverence is itself one of the most wholesome and hopeful elements in the character of the American people.

CHAPTER XXVI

THE FEDERAL SYSTEM

HAVING examined the several branches of the National government and the manner in which they work together, we may now proceed to examine the American commonwealth as a federation of States. The present chapter is intended to state concisely the main features which distinguish the Federal system, and from which it derives its peculiar character. Three other chapters will describe its practical working, and summarize the criticisms that may be passed upon it.

The contests in the Convention of 1787 over the framing of the Constitution, and in the country over its adoption, turned upon two points: the extent to which the several States should be recognized as independent and separate factors in the construction of the National government, and the quantity and nature of the powers which should be withdrawn from the States to be vested in that government. It has been well remarked that "the first of these, the definition of the structural powers, gave more trouble at the time than the second, because the line of partition between the powers of the States and the Federal government had been already fixed by the whole experience of the country." But since 1791 there has been practically no dispute as to the former point, and little as to the propriety of the provisions which define the latter. On the interpretation of these provisions there has, however, been endless debate, some deeming the Constitution to have taken more from the States, some less; while still warmer controversies have raged as to the matters which the instrument does not expressly deal with, and particularly whether the States retain their sovereignty, and with it the right of nullifying or refusing to be bound by certain acts of the National gov-

ernment, and in the last resort of withdrawing from the Union. As these latter questions (nullification and secession) have now been settled by the Civil War, we may say that in the America of to-day there exists a general agreement —

(1) That every State on entering the Union finally renounced its sovereignty, and is now for ever subject to the Federal authority as defined by the Constitution.

(2) That the functions of the States as factors of the National government are satisfactory, *i.e.* sufficiently secure its strength and the dignity of these communities.

(3) That the delimitation of powers between the National government and the States, contained in the Constitution, is convenient, and needs no fundamental alteration.

The ground which we have to tread during the remainder of this chapter is therefore no longer controversial ground, but that of well-established law and practice.

I. The distribution of powers between the National and the State governments is effected in two ways — Positively, by conferring certain powers on the National government; Negatively, by imposing certain restrictions on the States. It would have been superfluous to confer any powers on the States, because they retain all powers not actually taken from them. A lawyer may think that it was equally unnecessary and, so to speak, inartistic, to lay any prohibitions on the National government, because it could *ex hypothesi* exercise no powers not expressly granted. However, the anxiety of the States to fetter the master they were giving themselves caused the introduction of provisions qualifying the grant of express powers, and interdicting the National government from various kinds of action on which it might otherwise have been tempted to enter. The matter is further complicated by the fact that the grant of power to the National government is not in all cases an exclusive grant: *i.e.* there are matters which both, or either, the States and the National government may deal with. "The mere grant of a power to Congress does not of itself, in most cases, imply a prohibition upon the States to exercise the like power. . . . It is not the mere existence of the National power, but its exercise, which is incompatible with the exercise of the same power by the States." Thus we may distinguish the following classes of governmental powers: —

Powers vested in the National government alone.
Powers vested in the States alone.
Powers exercisable by either the National government or the States.
Powers forbidden to the National government.
Powers forbidden to the State governments.

It might be thought that the two latter classes are superfluous, because whatever is forbidden to the National government must be permitted to the States, and conversely, whatever is forbidden to the States must be permitted to the National government. But this is not so. For instance, Congress can grant no title of nobility (Art. i. § 9). But neither can a State do so (Art. i. § 10). The National government cannot take private property for public use without just compensation (Amendment v.). Apparently neither can any State do so (Amendment xiv. as interpreted in several cases). So no State can pass any law impairing the obligation of a contract (Art. i. § 10). But the National government, although not subject to a similar direct prohibition, has received no general power to legislate as regards ordinary contracts, and might therefore in some cases find itself equally unable to pass a law which a State legislature, though for a different reason, could not pass.[1] So no State can pass any *ex post facto* law. Neither can Congress.

What the Constitution has done is not to cut in half the totality of governmental functions and powers, giving part to the National government and leaving all the rest to the States, but to divide up this totality of authority into a number of parts which do not exhaust the whole, but leave a residuum of powers neither granted to the Union nor continued to the States but reserved to the people, who, however, can put them in force only by the difficult process of amending the Constitution. In other words, there are things in America which there exists no organized and permanent authority capable of legally doing, not a State, because it is expressly forbidden, not the National government, because it either has not received the competence or has been expressly forbidden.

[1] Of course Congress can legislate regarding some contracts, and can impair their obligation. It has power to regulate commerce, it can pass bankrupt laws, it can make paper money legal tender.

II. The powers vested in the National government alone are such as relate to the conduct of the foreign relations of the country and to such common National purposes as the army and navy, interstate commerce, currency, and the post-office, with provisions for the management of the machinery, legislative, executive, and judicial, charged with these purposes.[1]

The powers which remain vested in the States alone are all the other ordinary powers of internal government, such as legislation on private law, civil and criminal, the maintenance of law and order, the creation of local institutions, the provision for education and the relief of the poor, together with taxation for the above purposes.

III. The powers which are exercisable concurrently by the National government and by the States are —

Powers of legislation on some specified subjects, such as bankruptcy and certain commercial matters (*e.g.* pilot laws and harbour regulations), but so that State legislation shall take effect only in the absence of Federal legislation.

Powers of taxation, direct or indirect, but so that neither Congress nor a State shall tax exports from any State, and so that neither any State shall, except with the consent of Congress, tax any corporation or other agency created for Federal purposes or any act done under Federal authority, nor the National government tax any State or its agencies or property.

Judicial powers in certain classes of cases where Congress might have legislated, but has not, or where a party to a suit has a choice to proceed either in a Federal or a State court.

Powers of determining matters relating to the election of representatives and senators (but if Congress determines, the State law gives away).

IV. The prohibitions imposed on the National government are set forth in Art. i. § 9, and in the first ten amendments. The most important are —

Writ of *habeas corpus* may not be suspended, nor bill of attainder or *ex post facto* law passed.[2]

[1] See Art. i. § 8, Art. ii. § 2, Art. iii. § 2, Art. iv. §§ 3 and 4; Amendments xiii., xiv., xv. of the Constitution.

[2] The term "*ex post facto* law" is deemed to refer to criminal laws only.

No commercial preference shall be given to one State over another.

No title of nobility shall be granted.

No law shall be passed establishing or prohibiting any religion, or abridging the freedom of speech or of the press, or of public meeting or of bearing arms.

No religious test shall be required as a qualification for any office under the United States.

No person shall be tried for a capital or otherwise infamous crime unless on the presentment of a grand jury, or be subjected to a second trial for the same offence, or be compelled to be a witness against himself, or be tried otherwise than by a jury of his State and district.

No common law action shall be decided except by a jury where the value in dispute exceeds $20, and no fact determined by a jury shall be re-examined otherwise than by the rules of the common law.[1]

V. The prohibitions imposed on the States are contained in Art. i. § 10, and in the three latest amendments. They are intended to secure the National government against attempts by the States to trespass on its domain, and to protect individuals against oppressive legislation.

No State shall — Make any treaty or alliance: coin money: make anything but gold and silver coin a legal tender: pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts: grant any titles of nobility.

No State shall without the consent of Congress — Lay duties on exports or imports (the produce of such, if laid, going to the National treasury): keep troops or ships of war in time of peace: enter into an agreement with another State or with any foreign power: engage in war, unless actually invaded or in imminent danger.

Every State must — Give credit to the records and judicial proceedings of every other State: extend the privileges and immunities of citizens to the citizens of other States: deliver up fugitives from justice to the State entitled to claim them.

No State shall have any but a republican form of government.

No State shall — Maintain slavery: abridge the privileges

[1] Chiefly intended to prevent the methods of courts of equity from being applied in the Federal courts as against the findings of a jury.

of any citizen of the United States, or deny to him the right of voting, in respect of race, colour, or previous servitude: deprive any person of life, liberty, or property without due process of law: deny to any person the equal protection of the laws.

Note that this list contains no prohibition to a State to do any of the following things: — Establish a particular form of religion: endow a particular form of religion, or educational or charitable establishments connected therewith: abolish trial by jury in criminal or civil cases: suppress the freedom of speaking, writing, and meeting (provided that this be done equally as between different classes of citizens, and provided also that it be not done to such an extent as to amount to a deprivation of liberty without due process of law): limit the electoral franchise to any extent: extend the electoral franchise to women, minors, aliens.

These omissions are significant. They show that the framers of the Constitution had no wish to produce uniformity among the States in government or institutions, and little care to protect the citizens against abuses of State power.[1] They were content to trust for this to the provisions of the State Constitutions. Their chief aim was to secure the National government against encroachments on the part of the States, and to prevent causes of quarrel both between the central and State authorities and between the several States. The result has, on the whole, justified their action. So far from abusing their power of making themselves unlike one another, the States have tended to be too uniform, and have made fewer experiments in institutions than one could wish.

VI. The powers vested in each State are all of them original and inherent powers, which belonged to the State before it entered the Union. Hence they are *prima facie* unlimited, and if a question arises as to any particular power, it is presumed to be enjoyed by the State, unless it can be shown to have been taken away by the Federal Constitution; or, in other words, a State is not deemed to be subject to any restriction which the Constitution has not distinctly imposed.

[1] The fourteenth and fifteenth amendments are in this respect a novelty. The only restrictions of this kind to be found in the instrument of 1789 are those relating to contracts and *ex post facto* laws.

The powers granted to the National government are delegated powers, enumerated in and defined by the instrument which has created the Union. Hence the rule that when a question arises whether the National government possesses a particular power, proof must be given that the power was positively granted. If not granted, it is not possessed, because the Union is an artificial creation, whose government can have nothing but what the people have by the Constitution conferred. The presumption is therefore against the National government in such a case, just as it is for the State in a like case.

VII. The authority of the National government over the citizens of every State is direct and immediate, not exerted through the State organization, and not requiring the co-operation of the State government. For most purposes the National government ignores the States; and it treats the citizens of different States as being simply its own citizens, equally bound by its laws. The Federal courts, revenue officers, and post-office draw no help from any State officials, but depend directly on Washington. Hence, too, of course, there is no local self-government in Federal matters. No Federal official is elected by the people of any local area. Local government is purely a State affair.

On the other hand, the State in no wise depends on the National government for its organization or its effective working. It is the creation of its own inhabitants. They have given it its Constitution. They administer its government. It goes on its own way, touching the National government at but few points. That the two should touch at the fewest possible points was the intent of those who framed the Federal Constitution, for they saw that the less contact, the less danger of collision. Their aim was to keep the two mechanisms as distinct and independent of each other as was compatible with the still higher need of subordinating, for National purposes, the State to the central government.

VIII. It is a further consequence of this principle that the National government has but little to do with the States as States. Its relations are with their citizens, who are also its citizens, rather than with them as ruling commonwealths. In the following points, however, the Constitution does require certain services of the States: —

It requires each State government to direct the choice of, and accredit to the seat of the National government, two senators and so many representatives as the State is entitled to send.

It requires similarly that presidential electors be chosen, and vote in the States, and that their votes be transmitted to the National capital.

It requires each State to follow regulations prescribed by Congress when organizing and arming its militia, which, when duly summoned for active service, are placed under the command of the President.

It requires each State to maintain a republican form of government. (Conversely, a State may require the National government to protect it against invasion or domestic violence.)

IX. A State is, within its proper sphere, just as legally supreme, just as well entitled to give effect to its own will, as is the National government within its sphere; and for the same reason. All authority flows from the people. The people have given part of their supreme authority to the National, part to the State governments. Both hold by the same title, and therefore the National government, although superior wherever there is a concurrence of powers, has no more right to trespass upon the domain of a State than a State has upon the domain of Federal action. That the course which a State is following is pernicious, that its motives are bad and its sentiments disloyal to the Union, makes no difference until or unless it infringes on the sphere of Federal authority. It may be thought that however distinctly this may have been laid down as a matter of theory, in practice the State will not obtain the same justice as the National government, because the court which decides points of law in dispute between the two is in the last resort a Federal court, and therefore biassed in favour of the Federal government. In fact, however, little or no unfairness has arisen from this cause. The Supreme Court may, as happened for twenty years before the War of Secession, be chiefly composed of States' Rights men. In any case the court cannot stray far from the path which previous decisions have marked out.

X. There are several remarkable omissions in the Constitution of the American federation.

One is that there is no grant of power to the National government to coerce a recalcitrant or rebellious State. Another is that nothing is said as to the right of secession. Any one can understand why this right should not have been granted. But neither is it mentioned to be negatived.

The Constitution was an instrument of compromise[redacted] these were questions which it would have been unw[redacted] raise.

There is no abstract or theoretic declaration regardi[redacted] nature of the federation and its government, nothing as [redacted]e ultimate supremacy of the central authority outside the particular sphere allotted to it, nothing as to the so-called sovereign rights of the States. As if with a prescience of the dangers to follow, the wise men of 1787 resolved to give no opening for abstract inquiry and metaphysical dialectic. But in vain. The human mind is not to be so restrained. The drily legal and practical character of the Constitution did not prevent the growth of a mass of subtle and, so to speak, scholastic metaphysics regarding the nature of the government it created. The inextricable knots which American lawyers and publicists went on tying, down till 1861, were cut by the sword of the North in the Civil War, and need concern us no longer. It is now admitted that the Union is not a mere compact between commonwealths, dissoluble at pleasure, but an instrument of perpetual efficacy, emanating from the whole people, and alterable by them only in the manner which its own terms prescribe. It is "an indestructible Union of indestructible States."

It follows from the recognition of the indestructibility of the Union that there must somewhere exist a force capable of preserving it. The National government is now admitted to be such a force. "It can exercise all powers essential to preserve and protect its own existence and that of the States, and the constitutional relation of the States to itself and to one another."

CHAPTER XXVII

WORKING RELATIONS OF THE NATIONAL AND THE STATE GOVERNMENTS

THE characteristic feature and special interest of the American Union is that it shows us two governments covering the same ground, yet distinct and separate in their action. It is like a great factory wherein two sets of machinery are at work, their revolving wheels apparently intermixed, their bands crossing one another, yet each set doing its own work without touching or hampering the other. To keep the National government and the State governments each in the allotted sphere, preventing collision and friction between them, was the primary aim of those who formed the Constitution, a task the more needful and the more delicate because the States had been until then almost independent and therefore jealous of their privileges, and because, if friction should arise, the National government could not remove it by correcting defects in the machinery. For the National government, being itself the creature of the Constitution, was not permitted to amend the Constitution, but could only refer it back for amendment to the people of the States or to their legislatures. Hence the men of 1787, feeling the cardinal importance of anticipating and avoiding occasions of collision, sought to accomplish their object by the concurrent application of two devices. One was to restrict the functions of the National government to the irreducible minimum of functions absolutely needed for the national welfare, so that everything else should be left to the States. The other was to give that government, so far as those functions extended, a direct and immediate relation to the citizens, so that it should act on them not through the States but of its own authority and by its own officers.

The working relations of the National government to the

tates may be considered under two heads, viz. its relations to States as communities, and its relations to the citizens of tes as individuals, they being also citizens of the Union. National government touches the States as corporate ealths in three points. One is their function in rm the National government; another is the con- ver them by the Federal Constitution through the third is the control exercised over them by the ral legislature and executive in the discharge of the governing functions which these latter authorities possess.

I. The States serve to form the National government by choosing presidential electors, by choosing senators, and by fixing the franchise which qualifies citizens to vote for members of the House of Representatives.[1] No difficulty has ever arisen (except during the Civil War) from any unwillingness of the States to discharge these duties, for each State is eager to exercise as much influence as it can on the National executive and Congress. But note how much latitude has been left to the States. A State may appoint its presidential electors in any way it pleases. All States now do appoint them by popular vote. But during the first thirty years of the Union many States left the choice of electors to their respective legislatures. So a State may, by its power of prescribing the franchise for its State elections, prescribe whatever franchise it pleases for the election of its members of the Federal House of Representatives, and may thus admit persons who would in other States be excluded from the suffrage, or exclude persons who would in other States be admitted. For instance, fifteen States now allow aliens (*i.e.* foreigners not yet naturalized) to vote; and any State which should admit women to vote at its own State elections (as some States now do) would thereby admit them also to vote at congressional elections. The only restriction imposed on State discretion in this respect is that of the fifteenth amendment, which forbids any person to be deprived of suffrage on "account of race, colour, or previous condition of servitude."

[1] Congress may regulate by statute the times, places, and manner of holding elections for representatives (Const. Art. i. § 4), and has done so to some extent.

II. The Federal Constitution deprives the States of certain powers they would otherwise enjoy. Some of these, such as that of making treaties, are obviously unpermissible, and such as the State need not regret. Others, however, seriously restrain their daily action. They are liable to be sued in the Federal courts by another State or by a foreign Power. They cannot, except with the consent of Congress, tax exports or imports, or in any case pass a law impairing the obligation of a contract. They must surrender fugitives from the justice of any other State. Whether they have transgressed any of these restrictions is a question for the courts of law, and, if not in the first instance, yet always in the last resort a question for the Federal Supreme Court. If it is decided that they have transgressed, their act, be it legislative or executive, is null and void.[1]

The President as National executive, and Congress as National legislature, have also received from the Constitution the right of interfering in certain specified matters with the governments of the States. Congress of course does this by way of legislation, and when an Act of Congress, made within the powers conferred by the Constitution, conflicts with a State statute, the former prevails against the latter. It prevails by making the latter null and void, so that if a State statute has been duly passed upon a matter not forbidden to a State by the Constitution, and subsequently Congress passes an act on the same matter, being one whereon Congress has received the right to legislate, the State statute, which was previously valid, now becomes invalid to the extent to which it conflicts with the Act of Congress. For instance, Congress has power to establish a uniform law of bankruptcy over the whole Union. It has formerly, in the exercise of this power, passed bankruptcy laws; but these have been repealed, and at present the subject is left to the State laws, which are accordingly in

[1] Mr. Justice Miller observes (*Centennial Address at Philadelphia*) that "at no time since the formation of the Union has there been a period when there were not to be found on the statute books of some of the States acts passed in violation of the provisions of the Constitution regarding commerce, acts imposing taxes and other burdens upon the free interchange of commodities, discriminating against the productions of other States, and attempting to establish regulations of commerce, which the Constitution says shall only be done by Congress." All such acts are of course held invalid by the courts when questioned before them.

full force in the several States.[1] Were Congress again to legislate on the subject, these State laws would lose their force; and if the law passed by Congress were again repealed, they would again spring into life. The field of this so-called concurrent legislation is large, for Congress has not yet exercised all the powers vested in it of superseding State action.

It was remarked in the last chapter that in determining the powers of Congress on the one hand and of a State government on the other, opposite methods have to be followed. The presumption is always in favour of the State; and in order to show that it cannot legislate on a subject, there must be pointed out within the four corners of the Constitution some express prohibition of the right which it *prima facie* possesses, or some implied prohibition arising from the fact that legislation by it would conflict with legitimate Federal authority. On the other hand, the presumption is always against Congress, and to show that it can legislate, some positive grant of power to Congress in the Constitution must be pointed out.[2] When the grant is shown, then the Act of Congress has, so long as it remains on the statute book, all the force of the Constitution itself. In some instances the grant of power to Congress to legislate is auxiliary to a prohibition imposed on the States. This is notably the case as regards the amendments to the Constitution, passed for the protection of the lately liberated Negroes. They interdict the States from either recognizing slavery or discriminating in any way against any class of citizens; they go even beyond citizens in their care, and declare that "no State shall deny to any person within its jurisdiction the equal protection of the laws." Now, by each of these amendments, Congress is also empowered, which practically means enjoined, to "enforce by appropriate legislation" the prohibitions laid upon the States. Congress has done so, but some of its efforts have been held to go beyond the directions of the amendments, and to be therefore void. The grant of power has not covered them.

[1] See the interesting case of *Sturges* v. *Crowninshield*, 4 Wheat. 196.

[2] The grant need not, however, be express, for it has frequently been held that a power incidental or instrumental to a power expressly given may be conferred upon Congress by necessary implication. See *M'Culloch* v. *Maryland*, 4 Wheat. p. 316, and post, Chapter XXXI.

Where the President interferes with a State, he does so either under his duty to give effect to the legislation of Congress, or under the discretionary executive functions which the Constitution has entrusted to him. So if any State were to depart from a republican form of government, it would be his duty to bring the fact to the notice of Congress in order that the guarantee of that form contained in the Constitution might be made effective. If an insurrection broke out against the authority of the Union, he would (as in 1861) send Federal troops to suppress it. If there should be rival State governments, each claiming to be legitimate, the President might recognize and support the one which he deemed regular and constitutional.

Are these, it may be asked, the only cases in which Federal authority can interfere within the limits of a State to maintain order? Are law and order, *i.e.* the punishment of crimes and the enforcement of civil rights, left entirely to State authorities? The answer is: —

Offences against Federal statutes are justiciable in Federal courts, and punishable under Federal authority. There is no Federal common law of crimes.

Resistance offered to the enforcement of a Federal statute may be suppressed by Federal authority.

Attacks on the property of the Federal government may be repelled, and disturbance, thence arising, may be quelled by Federal authority. Thus in 1794 Washington suppressed the so-called Whisky Insurrection in Pennsylvania by the militia of Pennsylvania, New Jersey, Virginia, and Maryland;[1] and President Cleveland in 1894 ordered out United States troops to protect the mails in Illinois and some other Western States.

The judgments pronounced in civil causes by Federal courts are executed by the officers of these courts.

All other offences and disorders whatsoever are left to be dealt with by the duly constituted authorities of the State, who are, however, entitled in one case to summon the power of the Union to their aid.

This case is that of the breaking out in a State of serious disturbances. The President is bound on the application of

[1] This was the first assertion by arms of the supreme authority of the Union, and produced an enorm[illegible]ffect upon opinion.

the State legislature or executive to quell such disturbances by the armed forces of the Union, or by directing the militia of another State to enter. President Grant was obliged to use military force during the troubles which disturbed several of the Southern States after the Civil War; as was President Hayes, during the tumults in Pennsylvania caused by the great railway strikes of 1877. There have, however, been cases, such as the Dorr rebellion in Rhode Island in 1842, in which a State has itself suppressed an insurrection against its legitimate government. It is the duty of a State to do so if it can, and to seek Federal aid only in extreme cases, when resistance is formidable.

So far we have been considering the relations of the National government to the States as political communities. Let us now see what are its relations to the individual citizens of these States. They are citizens of the Union as well as of these States, and owe allegiance to both powers. Each power has a right to command their obedience. To which then, in case of conflict, is obedience due?

The right of the State to obedience is wider in the area of matters which it covers. *Prima facie*, every State law, every order of a competent State authority, binds the citizen, whereas the National government has but a limited power: it can legislate or command only for certain purposes or on certain subjects. But within the limits of its power, its authority is higher than that of the State, and must be obeyed even at the risk of disobeying the State.

The safe rule for the private citizen may be thus expressed: "Ascertain whether the Federal law is constitutional (*i.e.* such as Congress has power to pass). If it is, conform your conduct to it at all hazards. If it is not, disregard it, and obey the law of your State." This may seem hard on the private citizen. How shall he settle for himself such a delicate point of law as whether Congress had power to pass a particular statute, seeing that the question may be doubtful and not have come before the courts? But in practice little inconvenience arises, for Congress and the State legislatures have learnt to keep within their respective spheres, and the questions that arise between them are seldom such as need disturb an ordinary man.

The same remarks apply to conflicts between the commands of executive officers of the National government on the one hand, and those of State officials on the other. If the National officer is acting within his constitutional powers, he is entitled to be obeyed in preference to a State official, and conversely, if the State official is within his powers, and the National officer acting in excess of those which the Federal Constitution confers, the State official is to be obeyed.

The limits of judicial power are more difficult of definition. Every citizen can sue and be sued or indicted both in the courts of his State and in the Federal courts, but in some classes of cases the former, in others the latter, is the proper tribunal, while in many it is left to the choice of the parties before which tribunal they will proceed. Sometimes a plaintiff who has brought his action in a State court finds when the case has gone a certain length that a point of Federal law turns up which entitles either himself or the defendant to transfer it to a Federal court, or to appeal to such a court should the decision have gone against the applicability of the Federal law. Suits are thus constantly transferred from State courts to Federal courts, but no one can ever reverse the process and carry a suit from a Federal court to a State court.

Within its proper sphere of pure State law, — and of course the great bulk of the cases turn on pure State law, — there is no appeal from a State court to a Federal court; and though the point of law on which the case turns may be one which has arisen and been decided in the Supreme Court of the Union, a State judge, in a State case, is not bound to regard that decision. It has only a moral weight, such as might be given to the decision of an English court, and where the question is one of State law, whether common law or statute law, in which State courts have decided one way and a Federal court the other way, the State judge ought to follow his own courts. So far does this go, that a Federal court in administering State law, ought to reverse its own previous decision rather than depart from the view which the highest State court has taken.

When a plaintiff has the choice of proceeding in a State court or in a Federal court, he is sometimes, especially if he has a strong case, inclined to select the latter, because the

Federal judges are more independent than those of most of the States, and less likely to be influenced by any bias. So, too, if he thinks that local prejudice may tell against him, he will prefer a Federal court, because the jurors are summoned from a wider area, and because the judges are accustomed to exert a larger authority in guiding and controlling the jury. But it is usually more convenient to sue in a State court, seeing that there is such a court in every county, whereas Federal courts are comparatively few; in many States there is but one.

The Federal authority, be it executive or judicial, acts upon the citizens of a State directly by means of its own officers, who are quite distinct from and independent of the State officials. Federal indirect taxes, for instance, are levied all along the coast and over the country by Federal custom-house collectors and excisemen, acting under the orders of the treasury department at Washington. The judgments of Federal courts are carried out by United States marshals, likewise dispersed over the country and supplied with a staff of assistants. This is a provision of the utmost importance, for it enables the National government to keep its finger upon the people everywhere, and make its laws and the commands of its duly constituted authorities respected whether the State within whose territory it acts be heartily loyal or not, and whether the law which is being enforced be popular or obnoxious. The machinery of the National government ramifies over the whole Union as the nerves do over the human body, placing every point in direct connection with the central executive. The same is, of course, true of the army: but the army is so small and stationed in so few spots, mostly in the Far West where Indian raids are feared, that it scarcely comes into view in the ordinary working of the system.

What happens if the authority of the National government is opposed, if, for instance, an execution levied in pursuance of a judgment of a Federal court is resisted, or Federal excisemen are impeded in the seizure of an illicit distillery?

Supposing the United States marshal or other Federal officer to be unable to overcome the physical force opposed to him, he may summon all good citizens to assist him, just as the sheriff may summon the *posse comitatus*. If this appeal proves insufficient, he must call upon the President, who may either

order National troops to his aid or may require the militia of the State in which resistance is offered to overcome that resistance. Inferior Federal officers are not entitled to make requisitions for State force. The common law principle that all citizens are bound to assist the ministers of the law holds good in America as in England, but it is as true in the one country as in the other, that what is everybody's business is nobody's business. Practically, the Federal authorities are not resisted in the more orderly States.

If the duly constituted authorities of a State resist the laws and orders of the National government, a more difficult question arises. This has several times happened.

In 1808 the legislatures of some of the New England States passed resolutions condemning the embargo which the National government had laid upon shipping by an Act of that year. The State judges, emboldened by these resolutions, took an attitude consistently hostile to the embargo, holding it to be unconstitutional; popular resistance broke out in some of the coast towns; and the Federal courts in New England seldom succeeded in finding juries which would convict even for the most flagrant violation of its provisions. At the outbreak of the war of 1812 the governors of Massachusetts and Connecticut refused to allow the State militia to leave their State in pursuance of a requisition made by the President under the authority of an Act of Congress, alleging the requisition to be unconstitutional; and in October 1814 the legislatures of these two States and of Rhode Island, States in which the New England feeling against the war had risen high, sent delegates to a convention at Hartford, which, after three weeks of secret session, issued a report declaring that "it is as much the duty of the State authorities to watch over the rights reserved as of the United States to exercise the powers delegated." Massachusetts and Connecticut adopted the report; but before their commissioners reached Washington, peace with Great Britain had been concluded. In 1828–30 Georgia refused to obey an Act of Congress regarding the Cherokee Indians, and to respect the treaties which the United States had made with that tribe and the Creeks. The Georgian legislature passed and enforced Acts in contempt of Federal authority, and disregarded the orders of the Supreme Court, President Jackson,

who had an old frontiersman's hatred of the Indians, declining to interfere.

Finally, in 1832, South Carolina, first in a State convention and then by her legislature, declared the tariff imposed by Congress to be null and void as regarded herself, and proceeded to prepare for secession and war. In none of these cases was the dispute fought out either in the courts or in the field; and the questions as to the right of a State to resist Federal authority, and as to the means whereby she could be coerced, were left over for future settlement. Settled they finally were by the Civil War of 1861–65, since which time the following doctrines may be deemed established: —

No State has a right to declare an act of the Federal government invalid.

No State has a right to secede from the Union.

The only authority competent to decide finally on the constitutionality of an act of Congress or of the National executive is the Federal judiciary.

Any act of a State legislature or a State executive conflicting with the Constitution, or with an act of the National government done under the Constitution, is really an act not of the State government, which cannot legally act against the Constitution, but of persons falsely assuming to act as such government, and is therefore *ipso jure* void. Those who disobey Federal authority on the ground of the commands of a State authority are therefore insurgents against the Union who must be coerced by its power. The coercion of such insurgents is directed not against the State but against them as individual though combined wrong-doers. A State cannot secede and cannot rebel. Similarly, it cannot be coerced.

CHAPTER XXVIII

CRITICISM OF THE FEDERAL SYSTEM

It has long been agreed that the only possible form of government for America is a Federal one. All men have perceived that a centralized system would be inexpedient, if not unworkable, over so large an area, and have still more strongly felt that to cut up the continent into absolutely independent States would not only involve risks of war but injure commerce, and retard in a thousand ways the material development of every part of the country. But regarding the nature of the Federal tie that ought to exist there have been keen and frequent controversies, dormant at present, but which might break out afresh should there arise a new question of social or economic change capable of bringing the powers of Congress into collision with the wishes of any State or group of States. The general suitability to the country of a Federal system is therefore accepted, and need not be discussed. I pass to consider the strong and weak points of that which exists.

The faults generally charged on federations as compared with unified governments are the following:—

I. Weakness in the conduct of foreign affairs.

II. Weakness in home government, that is to say, deficient authority over the component States and the individual citizens.

III. Liability to dissolution by the secession or rebellion of States.

IV. Liability to division into groups and factions by the formation of separate combinations of the component States.

V. Want of uniformity among the States in legislation and administration.

VI. Trouble, expense, and delay due to the complexity of a double system of legislation and administration.

The first four of these are all due to the same cause, viz. the existence within one government, which ought to be able to

speak and act in the name and with the united strength of the nation, of distinct centres of force, organized political bodies into which part of the nation's strength has flowed, and whose resistance to the will of the majority of the whole nation is likely to be more effective than could be the resistance of individuals, because such bodies have each of them a government, a revenue, a militia, a local patriotism to unite them, whereas individual recalcitrants, however numerous, would be unorganized, and less likely to find a legal standing ground for opposition. The gravity of the first two of the four alleged faults has been exaggerated by most writers, who have assumed, on insufficient grounds, that Federal governments are necessarily weak. Let us, however, see how far America has experienced such troubles from these features of a Federal system.

I. In its early years, the Union was not successful in the management of its foreign relations. Few popular governments are, because a successful foreign policy needs in a world such as ours conditions which popular governments seldom enjoy. In the days of Adams, Jefferson, and Madison, the Union put up with a great deal of ill-treatment from France as well as from England. It drifted rather than steered into the war of 1812. The conduct of that war was hampered by the opposition of the New England States. The Mexican war of 1846 was due to the slaveholders; but as the combination among the Southern leaders which entrapped the nation into that conflict might have been equally successful in a unified country, the blame need not be laid at the door of Federalism. But when a question of external policy arises which interests only one part of the Union, the existence of States feeling themselves specially affected is apt to have a strong and probably an unfortunate influence. Only in this way can the American government be deemed likely to suffer in its foreign relations from its Federal character.

II. For the purposes of domestic government the Federal authority is now, in ordinary times, sufficiently strong. However, as was remarked in last chapter, there have been occasions when the resistance of even a single State disclosed its weakness. Had a man less vigorous than Jackson occupied the presidential chair in 1832, South Carolina would probably have prevailed against the Union. In the Kansas troubles of

1855–56 the National executive played a sorry part; and even in the resolute hands of President Grant it was hampered in the re-establishment of order in the reconquered Southern States by the rights which the Federal Constitution secured to those States. The only general conclusion on this point which can be drawn from history is that while the central government is likely to find less and less difficulty in enforcing its will against a State or disobedient subjects, because the prestige of its success in the Civil War has strengthened it and the facilities of communication make the raising and moving of troops more easy, nevertheless recalcitrant States, or groups of States, still enjoy certain advantages for resistance, advantages due partly to their legal position, partly to their local sentiment, which rebels might not have in unified countries like England, France, or Italy.

III. Everybody knows that it was the Federal system, and the doctrine of State sovereignty grounded thereon, and not expressly excluded, though certainly not recognized, by the Constitution, which led to the secession of 1861, and gave European powers a plausible ground for recognizing the insurgent minority as belligerents. Nothing seems now less probable than another secession, not merely because the supposed legal basis for it has been abandoned, and because the advantages of continued union are more obvious than ever before, but because the precedent of the victory won by the North will discourage like attempts in the future. This is so strongly felt that it has not even been thought worth while to add to the Constitution an amendment negativing the right to secede.

IV. The combination of States into groups was a familiar feature of politics before the war. South Carolina and the Gulf States constituted one such, and the most energetic, group; the New England States frequently acted as another, especially during the war of 1812. At present, though there are several sets of States whose common interests lead their representatives in Congress to act together, it is no longer the fashion for States to combine in an official way through their State organizations, and their doing so would excite reprehension. It is easier, safer, and more effective to act through the great National parties. Any considerable State interest (such as that of the silver-miners or cattle-men, or Protectionist

manufacturers) can generally compel a party to conciliate it by threatening to forsake the party if neglected. Political action runs less in State channels than it did formerly, and the only really threatening form which the combined action of States could take, that of using for a common disloyal purpose State revenues and the machinery of State governments, has become, since the failure of secession, most improbable.

V. The want of uniformity in private law and methods of administration is an evil which different minds will judge by different standards. Some may think it a positive benefit to secure a variety which is interesting in itself and makes possible the trying of experiments from which the whole country may profit. In the United States the possible diversity of laws is immense. Subject to a few prohibitions contained in the Constitution, each State can play whatever tricks it pleases with the law of family relations, of inheritance, of contracts, of torts, of crimes. But the actual diversity is not great, for all the States, save Louisiana, have taken the English common and statute law of 1776 as their point of departure, and have adhered to its main principles.

VI. I have left to the last the gravest reproach which Europeans have been wont to bring against Federalism in America. They attributed to it the origin, or at least the virulence, of the great struggle over slavery which tried the Constitution so severely. That struggle created parties which, though they had adherents everywhere, no doubt tended more and more to become identified with States, controlling the State organizations and bending the State governments to their service. It gave tremendous importance to legal questions arising out of the differences between the law of the Slave States and the Free States, questions which the Constitution had either evaded or not foreseen. It shook the credit of the Supreme Court by making the judicial decision of those questions appear due to partiality to the Slave States. It disposed the extreme men on both sides to hate the Federal Union which bound them in the same body with their antagonists. It laid hold of the doctrine of State rights and State sovereignty as entitling a commonwealth which deemed itself aggrieved to shake off allegiance to the National government. Thus at last it brought about secession and the great Civil War. Even when the war was over, the

dregs of the poison continued to haunt and vex the system, and bred fresh disorders in it. The constitutional duty of re-establishing the State governments of the conquered States on the one hand, and on the other hand the practical danger of doing so while their people remained disaffected, produced the military governments, the "carpet bag" governments, the Ku Klux Klan outrages, the gift of suffrage to a Negro population unfit for such a privilege, yet apparently capable of being protected in no other way. All these mischiefs, it has often been argued, are the results of the Federal structure of the government, which carried in its bosom the seeds of its own destruction, seeds sure to ripen so soon as there arose a question that stirred men deeply.

It may be answered not merely that the National government has survived this struggle and emerged from it stronger than before, but also that Federalism did not produce the struggle, but only gave to it the particular form of a series of legal controversies over the Federal pact followed by a war of States against the Union. Where such vast economic interests were involved, and such hot passions roused, there must anyhow have been a conflict, and it may well be that a conflict raging within the vitals of a centralized government would have proved no less terrible and would have left as many noxious *sequelae* behind.

In blaming either the conduct of a person or the plan and scheme of a government for evils which have actually followed, men are apt to overlook those other evils, perhaps as great, which might have flowed from different conduct or some other plan. All that can fairly be concluded from the history of the American Union is that Federalism is obliged by the law of its nature to leave in the hands of States powers whose exercise may give to political controversy a peculiarly dangerous form, may impede the assertion of National authority, may even, when long-continued exasperation has suspended or destroyed the feeling of a common patriotism, threaten National unity itself. Against this danger is to be set the fact that the looser structure of a Federal government and the scope it gives for diversities of legislation in different parts of a country may avert sources of discord, or prevent local discord from growing into a contest of national magnitude.

CHAPTER XXIX

MERITS OF THE FEDERAL SYSTEM

I DO not propose to discuss in this chapter the advantages of Federalism in general, for to do this we should have to wander off to other times and countries, to talk of Achaia and the Hanseatic League and the Swiss Confederation. I shall comment on those merits only which the experience of the American Union illustrates.

There are two distinct lines of argument by which their Federal system was recommended to the framers of the Constitution, and upon which it is still held forth for imitation to other countries. These lines have been so generally confounded that it is well to present them in a precise form.

The first set of arguments point to Federalism proper, and are the following: —

1. That Federalism furnishes the means of uniting commonwealths into one nation under one National government without extinguishing their separate administrations, legislatures, and local patriotisms. As the Americans of 1787 would probably have preferred complete State independence to the fusion of their States into a unified government, Federalism was the only resource. Federalism is an equally legitimate resource whether it is adopted for the sake of tightening or for the sake of loosening a pre-existing bond.

2. That Federalism supplies the best means of developing a new and vast country. It permits an expansion whose extent, and whose rate and manner of progress, cannot be foreseen to proceed with more variety of methods, more adaptation of laws and administration to the circumstances of each part of the territory, and altogether in a more truly natural and spontaneous way, than can be expected under a centralized government, which is disposed to apply its settled system through all its

dominions. Thus the special needs of a new region are met by the inhabitants in the way they find best: its special evils are cured by special remedies, perhaps more drastic than an old country demands, perhaps more lax than an old country would tolerate; while at the same time the spirit of self-reliance among those who build up these new communities is stimulated and respected.

3. That Federalism prevents the rise of a despotic central government, absorbing other powers, and menacing the private liberties of the citizen. This may now seem to have been an idle fear, so far as America was concerned. It was, however, a very real fear among the great-grandfathers of the present Americans, and nearly led to the rejection even of so undespotic an instrument as the Federal Constitution of 1789. Congress (or the President, as the case may be) is still sometimes described as a tyrant by the party which does not control it, simply because it is a central government: and the States are represented as bulwarks against its encroachments.

The second set of arguments relate to and recommend not so much Federalism as local self-government. I state them briefly because they are familiar.

4. Self-government stimulates the interest of people in the affairs of their neighbourhood, sustains local political life, educates the citizen in his daily round of civic duty, teaches him that perpetual vigilance and the sacrifice of his own time and labour are the price that must be paid for individual liberty and collective prosperity.

5. Self-government secures the good administration of local affairs by giving the inhabitants of each locality due means of overseeing the conduct of their business.

That these two sets of grounds are distinct appears from the fact that the sort of local interest which local self-government evokes is quite a different thing from the interest men feel in the affairs of a large body like an American State. So, too, the control over its own affairs of a township, or even a small county, where everybody can know what is going on, is quite different from the control exercisable over the affairs of a commonwealth with a million of people. Local self-government may exist in a unified country like England, and may be wanting in a Federal country like Germany. And in America itself,

while some States, like those of New England, possessed an admirably complete system of local government, others, such as Virginia, the old champion of State sovereignty, were imperfectly provided with it. Nevertheless, through both sets of arguments there runs the general principle, applicable in every part and branch of government, that, where other things are equal, the more power is given to the units which compose the nation, be they large or small, and the less to the nation as a whole and to its central authority, so much the fuller will be the liberties and so much greater the energy of the individuals who compose the people. This principle, though it had not been then formulated in the way men formulate it now, was heartily embraced by the Americans.

Three further benefits to be expected from a Federal system may be mentioned, benefits which seem to have been unnoticed or little regarded by those who established it in America.

6. Federalism enables a people to try experiments in legislation and administration which could not be safely tried in a large centralized country. A comparatively small commonwealth like an American State easily makes and unmakes its laws; mistakes are not serious, for they are soon corrected; other States profit by the experience of a law or a method which has worked well or ill in the State that has tried it.

7. Federalism, if it diminishes the collective force of a nation, diminishes also the risks to which its size and the diversities of its parts expose it. A nation so divided is like a ship built with water-tight compartments. When a leak is sprung in one compartment, the cargo stowed there may be damaged, but the other compartments remain dry and keep the ship afloat. So if social discord or an economic crisis has produced disorders or foolish legislation in one member of the Federal body, the mischief may stop at the State frontier instead of spreading through and tainting the nation at large.

8. Federalism, by creating many local legislatures with wide powers, relieves the National legislature of a part of that large mass of functions which might otherwise prove too heavy for it. Thus business is more promptly despatched, and the great central council of the nation has time to deliberate on those questions which most nearly touch the whole country.

All of these arguments recommending Federalism have proved valid in American experience.

To create a nation while preserving the States was the main reason for the grant of powers which the National government received; an all-sufficient reason, and one which holds good to-day. The several States have changed greatly since 1789, but they are still commonwealths whose wide authority and jurisdiction practical men are agreed in desiring to maintain.

Not much was said in the Convention of 1787 regarding the best methods of extending government over the unsettled territories lying beyond the Alleghany Mountains.[1] It was, however, assumed that they would develop as the older colonies had developed, and in point of fact each district, when it became sufficiently populous, was formed into a self-governing State, the less populous divisions still remaining in the status of semi-self-governing territories.

The utility of the State system in localizing disorders or discontents, and the opportunities it affords for trying easily and safely experiments which ought to be tried in legislation and administration, constitute benefits to be set off against the risks, referred to in the last preceding chapters, that evils may continue in a district, may work injustice to a minority and invite imitation by other States, which the wholesome stringency of the central government might have suppressed.

A more unqualified approval may be given to the division of legislative powers. The existence of the State legislatures relieves Congress of a burden too heavy for its shoulders; for although it has far less foreign policy to discuss than the Parliaments of England, France, or Italy, and although the separation of the executive from the legislative department gives it less responsibility for the ordinary conduct of the administration than devolves on those chambers, it could not possibly, were its competence as large as theirs, deal with the multiform and increasing demands of the different parts of the Union. There is great diversity in the material conditions of different parts of the country, and at present the people, particularly in the West, are eager to have their difficulties handled, their economic and social needs satisfied, by

[1] In 1787, however, the great Ordinance regulating the North-west Territory was enacted by the Congress of the Confederation.

the State and the law. How little Congress could satisfy them appears by the very imperfect success with which it cultivates the field of legislation to which it is now limited.

These merits of the Federal system of government which I have enumerated are the counterpart and consequences of that limitation of the central authority whose dangers were indicated in the last chapter. They are, if one may reverse the French phrase, the qualities of Federalism's defects. The problem which all federalized nations have to solve is how to secure an efficient central government and preserve National unity, while allowing free scope for the diversities, and free play to the authorities, of the members of the federation. It is, to adopt that favourite astronomical metaphor which no American panegyrist of the Constitution omits, to keep the centrifugal and centripetal forces in equilibrium, so that neither the planet States shall fly off into space, nor the sun of the central government draw them into its consuming fires. The characteristic merit of the American Constitution lies in the method by which it has solved this problem. It has given the National government a direct authority over all citizens, irrespective of the State governments, and has therefore been able safely to leave wide powers in the hands of those governments. And by placing the Constitution above both the National and the State governments, it has referred the arbitrament of disputes between them to an independent body, charged with the interpretation of the Constitution, a body which is to be deemed not so much a third authority in the government as the living voice of the Constitution, the unfolder of the mind of the people whose will stands expressed in that supreme instrument.

The application of these two principles, unknown to, or at any rate little used by, any previous federation, has contributed more than anything else to the stability of the American system, and to the reverence which its citizens feel for it, a reverence which is the best security for its permanence. Yet even these devices would not have succeeded but for the presence of a mass of moral and material influences stronger than any political devices, which have maintained the equilibrium of centrifugal and centripetal forces. On the one hand there has been the love of local independence and self-government;

on the other, the sense of community in blood, in language, in habits and ideas, a common pride in the National history and the National flag.

Quid leges sine moribus? The student of institutions, as well as the lawyer, is apt to overrate the effect of mechanical contrivances in politics. I admit that in America they have had one excellent result; they have formed a legal habit in the mind of the nation. But the true value of a political contrivance resides not in its ingenuity but in its adaptation to the temper and circumstances of the people for whom it is designed, in its power of using, fostering, and giving a legal form to those forces of sentiment and interest which it finds in being. So it has been with the American system. Just as the passions which the question of slavery evoked strained the Federal fabric, disclosing unforeseen weaknesses, so the love of the Union, the sense of the material and social benefits involved in its preservation, appeared in unexpected strength, and manned with zealous defenders the ramparts of the sovereign Constitution. It is this need of determining the suitability of the machinery for the workmen and its probable influence upon them, as well as the capacity of the workmen for using and their willingness to use the machinery, which makes it so difficult to predict the operation of a political contrivance, or, when it has succeeded in one country, to advise its imitation in another. The growing strength of the National government in the United States is largely due to sentimental forces that were weak a century ago, and to a development of internal communications which was then undreamt of. And the devices which we admire in the Constitution might prove unworkable among a people less patriotic and self-reliant, less law-loving and law-abiding, than are the (English) of America.

Citizens

CHAPTER XXX

THE AMENDMENT OF THE CONSTITUTION

The men who sat in the Convention of 1787 were not sanguine enough, like some of the legislating sages of antiquity, or like such imperial codifiers as the Emperor Justinian, to suppose that their work could stand unaltered for all time to come. They provided (Art. v.) that "Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as part of this Constitution when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode may be proposed by the Congress."

There are therefore two methods of framing and proposing amendments.

(A) Congress may itself, by a two-thirds vote in each house, prepare and propose amendments.

(B) The legislatures of two-thirds of the States may require Congress to summon a Constitutional Convention. Congress shall thereupon do so, having no option to refuse; and the Convention when called shall draft and submit amendments. No provision is made as to the election and composition of the Convention, matters which would therefore appear to be left to the discretion of Congress.

There are also two methods of enacting amendments framed and proposed in either of the foregoing ways. It is left to Congress to propose one or other method as Congress may think fit.

(X) The legislatures of three-fourths of the States may ratify any amendments submitted to them.

(Y) Conventions may be called in the several States, and three-fourths of these Conventions may ratify.

On all the occasions on which the amending power has been exercised, method A has been employed for proposing and method X for ratifying — *i.e.* no drafting Conventions of the whole Union or ratifying Conventions in the several States have ever been summoned. The preference of the action of Congress and the State legislatures may be ascribed to the fact that it has never been desired to remodel the whole Constitution, but only to make changes or additions on special points. Moreover, the procedure by National and State Conventions might be slower, and would involve controversy over the method of electing those bodies. The consent of the President is not required to a constitutional amendment. A two-thirds majority in Congress can override his veto of a bill, and at least that majority is needed to bring a constitutional amendment before the people.

There is only one provision of the Constitution which cannot be changed by this process. It is that which secures to each and every State equal representation in one branch of the legislature. "No State without its consent shall be deprived of its equal suffrage in the Senate" (Art. v.). It will be observed that this provision does not require unanimity on the part of the States to a change diminishing or extinguishing State representation in the Senate, but merely gives any particular State proposed to be effected an absolute veto on the proposal. If a State were to consent to surrender its rights, and three-fourths of the whole number to concur, the resistance of the remaining fourth would not prevent the amendment from taking effect.

The amendments made by the above process (A + X) to the Constitution have been in all fifteen in number. These have been made on four occasions, and fall into four groups, two of which consist of one amendment each. The first group, including ten amendments made immediately after the adoption of the Constitution, ought to be regarded as a supplement or postscript to it, rather than as changing it. They constitute what the Americans, following the English precedent, call a Bill of Rights, securing the individual citizen and the States against the encroachments of Federal power. The second and

third groups, if a single amendment can be properly called a group (viz. amendments xi. and xii.) are corrections of minor defects which had disclosed themselves in the working of the Constitution. The fourth group is the only one which marked a political crisis and registered a political victory. It comprises three amendments (xiii., xiv., xv.) which forbid slavery, define citizenship, secure the suffrage of citizens against attempts by States to discriminate to the injury of particular classes, and extend Federal protection to those citizens who may suffer from the operation of certain kinds of unjust State laws. These three amendments are the outcome of the War of Secession, and were needed in order to confirm and secure for the future its results. The requisite majority of States was obtained under conditions altogether abnormal, some of the lately conquered States ratifying while actually controlled by the Northern armies, others as the price which they were obliged to pay for the re-admission to Congress of their senators and representatives. The details belong to history: all we need here note is that these deep-reaching, but under the circumstances perhaps unavoidable, changes were carried through not by the free will of the peoples of three-fourths of the States, but under the pressure of a majority which had triumphed in a great war, and used its command of the National government and military strength of the Union to effect purposes deemed indispensable to the reconstruction of the Federal system.

Many amendments to the Constitution have been at various times suggested to Congress by Presidents, or brought forward in Congress by members, but very few of these have ever obtained the requisite two-thirds vote of both Houses.

The moral of these facts is not far to seek. Although it has long been the habit of the Americans to talk of their Constitution with almost superstitious reverence, there have often been times when leading statesmen, perhaps even political parties, would have materially altered it if they could have done so. There have, moreover, been some alterations suggested in it, which the impartial good sense of the wise would have approved, but which have never been submitted to the States, because it was known they could not be carried by the

requisite majority.[1] If, therefore, comparatively little use has been made of the provisions for amendment, this has been due, not solely to the excellence of the original instrument, but also to the difficulties which surround the process of change. Alterations, though perhaps not large alterations, have been needed, to cure admitted faults or to supply dangerous omissions, but the process has been so difficult that it has never been successfully applied, except either to matters of minor consequence involving no party interests (Amendments xi. and xii.), or in the course of a revolutionary movement which had dislocated the Union itself (Amendments xiii., xiv., xv.).

Why then has the regular procedure for amendment proved in practice so hard to apply?

Partly, of course, owing to the inherent disputatiousness and perversity of bodies of men. It is difficult to get two-thirds of two assemblies (the Houses of Congress) and three-fourths of forty-five commonwealths, each of which acts by two assemblies, for the State legislatures are all double-chambered, to agree to the same practical proposition. Except under the pressure of urgent troubles, such as were those which procured the acceptance of the Constitution itself in 1788, few persons or bodies will consent to forego objections of detail, perhaps in themselves reasonable, for the mere sake of agreeing to

[1] In the forty-ninth Congress (1884–6) no fewer than forty-seven propositions were introduced for the amendment of the Constitution, some of them of a sweeping, several of a rather complex, nature. (Some of these covered the same ground, so the total number of alterations proposed was less than forty-seven.) None seems to have been voted on by Congress; and only five or six even deserved serious consideration. One at least, that enabling the President to veto items in an appropriation bill, would have effected a great improvement. I find among them the following proposals: To prohibit the sale of alcoholic liquors, to forbid polygamy, to confer the suffrage on women, to vest the election of the President directly in the people, to elect representatives for three instead of two years, to choose senators by popular election, to empower Congress to limit the hours of labour, to empower Congress to pass uniform laws regarding marriage and divorce, to enable the people to elect certain Federal officers, to forbid Congress to pass any local private or special enactment, to forbid Congress to direct the payment of claims legally barred by lapse of time, to forbid the States to hire out the labour of prisoners.

In the first session of the fifty-first Congress twenty-eight such propositions were introduced, including proposals for the prohibition of lotteries, to suppress trusts and prohibit gambling in agricultural products, to modify the clause in the Federal Constitution regarding the obligation of contracts.

what others have accepted. They want to have what seems to themselves the very best, instead of a second best suggested by some one else. Now, bodies enjoying so much legal independence as do the legislatures of the States, far from being disposed to defer to Congress or to one another, are more jealous, more suspicious, more vain and opinionated, than so many individuals. Nothing but a violent party spirit, seeking either a common party object or individual gain to flow from party success, makes them work together.

If an amendment comes to the legislatures recommended by the general voice of their party, they will be quick to adopt it. But in that case it will encounter the hostility of the opposite party, and parties are in most of the northern States pretty evenly balanced. It is seldom that a two-thirds majority in either House of Congress can be secured on a party issue; and of course such majorities in both Houses, and a three-fourths majority of State legislatures on a party issue, are still less probable. Now, in a country pervaded by the spirit of party, most questions either are at starting, or soon become controversial. A change in the Constitution, however useful its ultimate consequences, is likely to be for the moment deemed more advantageous to one party than to the other, and this is enough to make the other party oppose it. The mere fact that a proposal comes from one side, rouses the suspicion of the other.

It is evident when one considers the nature of a rigid or supreme Constitution, that some method of altering it so as to make it conform to altered facts and ideas is indispensable. A European critic may remark that the American method has failed to answer the expectations formed of it. The belief, he will say, of its authors was that while nothing less than a general agreement would justify alteration, that agreement would exist when omissions impeding its working were discovered. But this has not come to pass. There have been long and fierce controversies over the construction of several points in the Constitution, over the right of Congress to spend money on internal improvements, to charter a National bank, to impose a protective tariff, above all, over the treatment of slavery in the Territories. But the method of amendment was not applied to any of these questions,

because no general agreement could be reached upon them, or indeed upon any but secondary matters. So the struggle over the interpretation of a document which it was found impossible to amend, passed from the law courts to the battle-field. Americans reply to such criticisms by observing that the power of amending the Constitution is one which cannot prudently be employed to conclude current political controversies, that if it were so used no Constitution could be either rigid or reasonably permanent, that some latitude of construction is desirable, and that in the above-mentioned cases amendments excluding absolutely one or other of the constructions contended for would either have tied down the legislature too tightly or have hastened a probably inevitable conflict.

CHAPTER XXXI

THE INTERPRETATION OF THE CONSTITUTION

History knows few instruments which in so few words lay down equally momentous rules on a vast range of matters of the highest importance and complexity as the Constitution of the United States. The Convention of 1787 were well advised in making their draft short, because it was essential that the people should comprehend it, because fresh differences of view would have emerged the further they had gone into details, and because the more one specifies, the more one has to specify and to attempt the impossible task of providing beforehand for all contingencies. These sages were therefore content to lay down a few general rules and principles, leaving some details to be filled in by congressional legislation, and foreseeing that for others it would be necessary to trust to interpretation.

It is plain that the shorter a law is, the more general must its language be, and the greater therefore the need for interpretation. So too the greater the range of a law, and the more numerous and serious the cases which it governs, the more frequently will its meaning be canvassed. There have been statutes dealing with private law, such as the Lex Aquilia at Rome and the Statute of Frauds in England, on which many volumes of commentaries have been written, and thousands of juristic and judicial constructions placed. Much more then must we expect to find great public and constitutional enactments subjected to the closest scrutiny in order to discover every shade of meaning which their words can be made to bear. Probably no writing except the New Testament, the Koran, the Pentateuch, and the Digest of the Emperor Justinian, has employed so much ingenuity and labour as the American Constitution, in sifting, weighing, comparing, illustrating, twisting, and torturing its text.

The Constitution of the United States is so concise and so general in its terms, that even had America been as slowly moving a country as China, many questions must have arisen on the interpretation of the fundamental law which would have modified its aspect. But America has been the most swiftly expanding of all countries. Hence the questions that have presented themselves have often related to matters which the framers of the Constitution could not have contemplated. Wiser than Justinian before them or Napoleon after them, they foresaw that their work would need to be elucidated by judicial commentary. But they were far from conjecturing the enormous strain to which some of their expressions would be subjected in the effort to apply them to new facts.

I must not venture on any general account of the interpretation of the Constitution, nor attempt to set forth the rules of construction laid down by judges and commentators, for this is a vast matter and a matter for law books. All that this chapter has to do is to indicate, very generally, in what way and with what results the Constitution has been expanded, developed, modified, by interpretation; and with that view there are three points that chiefly need discussion: (1) the authorities entitled to interpret the Constitution, (2) the main principles followed in determining whether or no the Constitution has granted certain powers, (3) the checks on possible abuses of the interpreting power.

I. To whom does it belong to interpret the Constitution? Any question arising in a legal proceeding as to the meaning and application of this fundamental law will evidently be settled by the courts of law. Every court is equally bound to pronounce and competent to pronounce on such questions, a State court no less than a Federal court; but as all the more important questions are carried by appeal to the supreme Federal court, it is practically that court whose opinion finally determines them.

Where the Federal courts have declared the meaning of a law, every one ought to accept and guide himself by their deliverance. But there are always questions of construction which have not been settled by the courts, some because they have not happened to arise in a law-suit, others because they are such as can scarcely arise in a law-suit. As regards such

points, every authority, Federal or State, as well as every citizen, must be guided by the best view he or they can form of the true intent and meaning of the Constitution, taking, of course, the risk that this view may turn out to be wrong.

There are also points of construction which every court, following a well-established practice, will refuse to decide, because they are deemed to be of "a purely political nature," a vague description, but one which could be made more specific only by an enumeration of the cases which have settled the practice. These points are accordingly left to the discretion of the executive and legislative powers, each of which forms its view as to the matters falling within its sphere, and in acting on that view is entitled to the obedience of the citizens and of the States also.

It is therefore an error to suppose that the judiciary is the only interpreter of the Constitution, for a certain field remains open to the other authorities of the government, whose views need not coincide, so that a dispute between those authorities, although turning on the meaning of the Constitution, may be incapable of being settled by any legal proceeding. This causes no great confusion, because the decision, whether of the political or the judicial authority, is conclusive so far as regards the particular controversy or matter passed upon.

II. The Constitution has been expanded by construction in two ways. Powers have been exercised, sometimes by the President, more often by the legislature, in passing statutes, and the question has arisen whether the powers so exercised were rightfully exercised, *i.e.* were really contained in the Constitution. When the question was resolved in the affirmative by the court, the power has been henceforth recognized as a part of the Constitution, although, of course, liable to be subsequently denied by a reversal of the decision which established it. This is one way. The other is where some piece of State legislation alleged to contravene the Constitution has been judicially decided to contravene it, and to be therefore invalid. The decision, in narrowing the limits of State authority, tends to widen the prohibitive authority of the Constitution, and confirms it in a range and scope of action which was previously doubtful.

Questions of the above kinds sometimes arise as questions of

Interpretation in the strict sense of the term, *i.e.* as questions of the meaning of a term or phrase which is so far ambiguous that it might be taken either to cover or not to cover a case apparently contemplated by the people when they enacted the Constitution. Sometimes they are rather questions to which we may apply the name of Construction, *i.e.* the case that has arisen is one apparently not contemplated by the enactors of the Constitution, or one which, though possibly contemplated, has for brevity's sake been omitted; but the Constitution has nevertheless to be applied to its solution.

Now the doctrines laid down by Chief-Justice Marshall, and on which the courts have constantly since proceeded, may be summed up in two propositions.

1. Every power alleged to be vested in the National government, or any organ thereof, must be affirmatively shown to have been granted. There is no presumption in favour of the existence of a power; on the contrary, the burden of proof lies on those who assert its existence, to point out something in the Constitution which, either expressly or by necessary implication, confers it. Just as an agent, claiming to act on behalf of his principal, must make out by positive evidence that his principal gave him the authority he relies on; so Congress, or those who rely on one of its statutes, are bound to show that the people have authorized the legislature to pass the statute. The search for the power will be conducted in a spirit of strict exactitude, and if there be found in the Constitution nothing which directly or impliedly conveys it, then whatever the executive or legislature of the National government, or both of them together, may have done in the persuasion of its existence, must be deemed null and void, like the act of any other unauthorized agent.[1]

2. When once the grant of a power by the people to the

[1] For instance, several years ago a person summoned as a witness before a committee of the House of Representatives was imprisoned by order of the House for refusing to answer certain questions put to him. He sued the sergeant-at-arms for false imprisonment, and recovered damages, the Supreme Court holding that as the Constitution could not be shown to have conferred on either House of Congress any power to punish for contempt, that power (though frequently theretofore exercised) did not exist, and the order of the House therefore constituted no defence for the sergeant's act (*Kilbourn* v. *Thompson*, 103 U. S. 168).

National government has been established, that power will be construed broadly. The strictness applied in determining its existence gives place to liberality in supporting its application. The people,— so Marshall and his successors have argued, — when they confer a power, must be deemed to confer a wide discretion as to the means whereby it is to be used in their service. For their main object is that it should be used vigorously and wisely, which it cannot be if the choice of methods is narrowly restricted; and while the people may well be chary in delegating powers to their agents, they must be presumed, when they do grant these powers, to grant them with confidence in the agents' judgment, allowing all that freedom in using one means or another to attain the desired end which is needed to ensure success.[1] This, which would in any case be the common-sense view, is fortified by the language of the Constitution, which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof." The sovereignty of the National government, therefore, "though limited to specified objects, is plenary as to those objects" and supreme in its sphere. Congress, which cannot go one step beyond the circle of action which the Constitution has traced for it, may within that circle choose any means which it deems apt for executing its powers, and is in its choice of means subject to no review by the courts in their function of interpreters, because the people have made their representatives the sole and absolute judges of the mode in which the granted powers shall be employed. This doctrine of implied powers, and the interpretation of the words "necessary and proper," were for many years a theme of bitter and incessant controversy among American lawyers and publicists.

The three lines along which this development of the implied powers of the government has chiefly progressed, have been those marked out by the three express powers of taxing and borrowing money, of regulating commerce, and of carrying on

[1] For instance, Congress having power to declare war, has power to prosecute it by all means necessary for success, and to acquire territory either by conquest or treaty. Having power to borrow money, Congress may, if it thinks fit, issue treasury notes, and may make them legal tender.

war. Each has produced a progeny of subsidiary powers, some of which have in their turn been surrounded by an unexpected offspring. Thus from the taxing and borrowing powers there sprang the powers to charter a National bank and exempt its branches and its notes from taxation by a State (a serious restriction on State authority), to create a system of custom-houses and revenue cutters, to establish a tariff for the protection of native industry. Thus the regulation of commerce has been construed to include legislation regarding every kind of transportation of goods and passengers, whether from abroad or from one State to another, regarding navigation, maritime and internal pilotage, maritime contracts, etc., together with the control of all navigable waters not situate wholly within the limits of one State, the construction of all public works helpful to commerce between States or with foreign countries, the power to prohibit immigration, and finally a power to establish a railway commission and control all inter-State traffic. The war power proved itself even more elastic. The executive and the majority in Congress found themselves during the War of Secession obliged to stretch this power to cover many acts trenching on the ordinary rights of the States and of individuals, till there ensued something which, fifty years earlier, would have been deemed to approach a suspension of constitutional guarantees in favour of the Federal government.

The courts have occasionally gone even further afield, and have professed to deduce certain powers of the legislature from the sovereignty inherent in the National government. In its last decision on the legal tender question, a majority of the Supreme Court seems to have placed upon this ground, though with special reference to the section enabling Congress to borrow money, its affirmance of that competence of Congress to declare paper money a legal tender for debts, which the earlier decision of 1871 had referred to the war power. This position evoked a controversy of wide scope, for the question what sovereignty involves belongs as much to political as to legal science, and may be pushed to great lengths upon considerations with which law proper has little to do.

The above-mentioned instances of development have been worked out by the courts of law. But others are due to the action of the executive, or of the executive and Congress con-

jointly. Thus, in 1803, President Jefferson negotiated and completed the purchase of Louisiana, the whole vast possessions of France beyond the Mississippi. He believed himself to be exceeding any powers which the Constitution conferred; and desired to have an amendment to it passed, in order to validate his act. But Congress and the people did not share his scruples, and the approval of the legislature was deemed sufficient ratification for a step of transcendent importance, which no provision of the Constitution bore upon. In 1807 and in 1808 Congress laid, by two statutes, an embargo on all shipping in United States ports, thereby practically destroying the lucrative carrying trade of the New England States. Some of these States declared the Act unconstitutional, arguing that a power to regulate commerce was not a power to annihilate it, and their courts held it to be void. Congress, however, persisted for a year, and the Act, on which the Supreme Court never formally pronounced, has been generally deemed within the Constitution, though Justice Story (who had warmly opposed it when he sat in Congress) remarks that it went to the extreme verge.

More startling, and more far-reaching in their consequences, were the assumptions of Federal authority made during the War of Secession by the executive, and confirmed, some expressly, some tacitly, by Congress and the people. It was only a few of these that came before the courts, and the courts, in some instances, disapproved them. But the executive continued to exert this extraordinary authority. Appeals made to the letter of the Constitution by the minority were discredited by the fact that they were made by persons sympathizing with the Secessionists who were seeking to destroy it. So many extreme things were done under the pressure of necessity that something less than these extreme things came to be accepted as a reasonable and moderate compromise.[1]

We now come to the third question: How is the interpreting authority restrained? If the American Constitution is capable of being so developed by this expansive interpretation, what

[1] Such as the suspension of the writ of *habeas corpus*, the emancipation of the slaves of persons aiding in the rebellion, the suspension of the statute of limitations, the practical extinction of State banks by increased taxation laid on them under the general taxing power.

security do its written terms offer to the people and to the States? What becomes of the special value claimed for rigid constitutions, that they preserve the frame of government unimpaired in its essential merits, that they restrain the excesses of a transient majority, and (in federations) the aggressions of a central authority?

The answer is two-fold. In the first place, the interpreting authority is, in questions not distinctly political, different from the legislature and from the executive, amenable to neither, and composed of lawyers imbued with professional habits. There is therefore a probability that it will disagree with either of them when they attempt to transgress the Constitution, and will decline to stretch the law so as to sanction encroachments those authorities may have attempted. In point of fact, there have been few cases, and those chiefly cases of urgency during the war, in which the judiciary has been even accused of lending itself to the designs of the other organs of government. The period when extensive interpretation was most active (1800–35) was also the period when the party opposed to a strong central government commanded Congress and the executive, and so far from approving the course the court took, the dominant party then often complained of it.

In the second place, there stands above and behind the legislature, the executive, and the judiciary, another power, that of public opinion. The President, Congress, and the courts are all, the two former directly, the latter practically, amenable to the people, and anxious to be in harmony with the general current of its sentiment. If the people approve the way in which these authorities are interpreting and using the Constitution, they go on; if the people disapprove, they pause, or at least slacken their pace. Generally the people have approved of such action by the President or Congress as has seemed justified by the needs of the time, even though it may have gone beyond the letter of the Constitution: generally they have approved the conduct of the courts whose legal interpretation has upheld such legislative or executive action. Public opinion sanctioned the purchase of Louisiana, and the still bolder action of the executive in the Secession War. It approved the Missouri compromise of 1820, which the Supreme Court thirty-seven years afterwards declared to have been in

excess of the powers of Congress. But it disapproved the Alien and Sedition laws of 1798, and although these statutes were never pronounced unconstitutional by the courts, this popular censure has prevented any similar legislation since that time.[1] The people have, of course, much less exact notions of the Constitution than the legal profession or the courts. But while they generally desire to see the powers of the government so far expanded as to enable it to meet the exigencies of the moment, they are sufficiently attached to its general doctrines, they sufficiently prize the protection it affords them against their own impulses, to censure any interpretation which palpably departs from the old lines. And their censure is, of course, still more severe if the court seems to be acting at the bidding of a party.

A singular result of the importance of constitutional interpretation in the American government may be here referred to. It is this, that the United States legislature has been very largely occupied in purely legal discussions. When it is proposed to legislate on a subject which has been heretofore little dealt with, the opponents of a measure have two lines of defence. They may, as Englishmen would in a like case, argue that the measure is inexpedient. But they may also, which Englishmen cannot, argue that it is unconstitutional, *i.e.* illegal, because transcending the powers of Congress. This is a question fit to be raised in Congress, not only as regards matters with which, as being purely political, the courts of law will refuse to interfere, but as regards all other matters also, because since a decision on the constitutionality of a statute can never be obtained from the judges by anticipation, the legislature ought to consider whether they are acting within their competence. And it is a question on which a stronger case can often be made, and made with less exertion, than on the issue whether the measure be substantially expedient. Hence it is usually put in the fore-front of the battle, and argued with great vigour and acumen by leaders who are probably more ingenious as lawyers than they are far-sighted as statesmen.

A further consequence of this habit is pointed out by one of

[1] So it disapproved strongly, in the Northern States, of the judgments delivered by the majority of the Supreme Court in the Dred Scott case.

the most thoughtful among American constitutional writers. Legal issues are apt to dwarf and obscure the more substantially important issues of principle and policy, distracting from these latter the attention of the nation as well as the skill of congressional debaters.

The interpretation of the Constitution has at times become so momentous as to furnish a basis for the formation of political parties; and the existence of parties divided upon such questions has of course stimulated the interest with which points of legal interpretation have been watched and canvassed. Soon after the formation of the National government, in 1789, two parties grew up, one advocating a strong central authority, the other championing the rights of the States. Of these parties the former naturally came to insist on a liberal, an expansive, perhaps a lax construction of the words of the Constitution, because the more wide is the meaning placed upon its grant of powers, so much the wider are those powers themselves. The latter party, on the other hand, was acting in protection both of the States and of the individual citizen against the central government, when it limited by a strict and narrow interpretation of the fundamental instrument the powers which that instrument conveyed. The distinction which began in those early days has never since vanished. There has always been a party professing itself disposed to favour the central government, and therefore a party of broad construction. There has always been a party claiming that it aimed at protecting the rights of the States, and therefore a party of strict construction. Some writers have gone so far as to deem these different views of interpretation to be the foundation of all the political parties that have divided America. This view, however, inverts the facts. It is not because men have differed in their reading of the Constitution that they have advocated or opposed an extension of Federal powers; it is their attitude on this substantial issue that has determined their attitude on the verbal one. Moreover, the two great parties have several times changed sides on the very question of interpretation. The purchase of Louisiana and the Embargo Acts were the work of the strict constructionists, while it was the loose constructionist party which protested against the latter measure, and which, at the Hartford Convention of 1814, advanced

doctrines of State rights almost amounting to those subsequently asserted by South Carolina in 1832 and by the Secessionists of 1861. Parties in America, as in most countries, have followed their temporary interest; and if that interest happened to differ from some traditional party doctrine, they have explained the latter away. Whenever there has been a serious party conflict, it has been in reality a conflict over some living and practical issue, and only in form a debate upon canons of legal interpretation. What is remarkable, though natural enough in a country governed by a written instrument, is that every controversy has got involved with questions of constitutional construction.

The results were both good and evil. They were good in so far as they made both parties profess themselves defenders of the Constitution, zealous only that it should be interpreted aright; as they familiarized the people with its provisions, and made them vigilant critics of every legislative or executive act which could affect its working. They were evil in distracting public attention from real problems to the legal aspect of those problems, and in cultivating a habit of casuistry which threatened the integrity of the Constitution itself.

CHAPTER XXXII

THE DEVELOPMENT OF THE CONSTITUTION BY USAGE

There is yet another way in which the Constitution has been developed. This is by laying down rules on matters which are within its general scope, but have not been dealt with by its words, by the creation of machinery which it has not provided for the attainment of objects it contemplates, or, to vary the metaphor, by ploughing and planting ground which, though included within the boundaries of the Constitution, was left waste by those who drew up the original instrument.

Although the Constitution is curiously minute upon some comparatively small points, such as the qualifications of members of Congress and the official record of their votes, it passes over in silence many branches of political action, many details essential to every government. Some may have been forgotten, but some were purposely omitted, because the Convention could not agree upon them, or because they would have provoked opposition in the ratifying conventions, or because they were thought unsuited to a document which it was desirable to draft concisely and to preserve as far as possible unaltered. This was wise and indeed necessary, but it threw a great responsibility upon those who had to work the government which the Constitution created. They found nothing within the four corners of the instrument to guide them on points whose gravity was perceived as soon as they had to be settled in practice. Many of such points could not be dealt with by interpretation or construction, however liberally extensive it might be, because there was nothing in the words of the Constitution from which such construction could start, and because they were in some instances matters which, though important, could not be based upon principle, but must be settled by an arbitrary determination.

Their settlement, which began with the first Congress, has been effected in two ways, by congressional legislation and by usage.

Congress was empowered by the Constitution to pass statutes on certain prescribed topics. On many other topics not specially named, but within its general powers, statutes were evidently needed. For instance, the whole subject of Federal taxation, direct and indirect, the establishment of Federal courts, inferior to the Supreme Court, and the assignment of particular kinds and degrees of jurisdiction to each class of courts, the organization of the civil, military, and naval services of the country, the administration of Indian affairs and of the Territories, the rules to be observed in the elections of Presidents and senators, these and many other matters of high import are regulated by statutes, statutes which Congress can of course change, but which, in their main features, have not been greatly changed since their first enactment.

Next as to usage. Custom, which is a law-producing agency in every department, is specially busy in matters which pertain to the practical conduct of government. Understandings and conventions are in modern practice no less essential to the smooth working of the English Constitution, than are the principles enunciated in the Bill of Rights. Now, understandings are merely long-established usages, sanctioned by no statute, often too vague to admit of precise statement,[1] yet in some instances deemed so binding that a breach of them would damage the character of a statesman or a ministry just as much as the transgression of a statute. In the United States there are fewer such understandings than in England, because under a constitution drawn out in one fundamental document everybody is more apt to stand upon his strict legal rights, and the spirit of institutions departs less widely from their formal character. Nevertheless some of those features of

[1] For instance, it is impossible to state precisely the practical (as distinguished from the legal) rights of the House of Lords to reject bills passed by the House of Commons, or the duty of the Crown when a Cabinet makes some very unusual request; although it is admitted that as a rule the Lords ought to yield to the Commons and the Crown to be guided by the advice of its ministers.

American government, to which its character is chiefly due, and which recur most frequently in its daily working, rest neither upon the Constitution nor upon any statute, but upon usage alone. Here are some instances: —

The presidental electors have by usage, and by usage only, lost the right the Constitution gave them of exercising their discretion in the choice of a chief magistrate.

The President is not re-elected more than once, though the Constitution places no restriction whatever on re-eligibility.

The President uses his veto more freely than he did at first, and for a wider range of purpose.

The Senate now never exercises its undoubted power of refusing to confirm the appointments made by the President to Cabinet offices.

The President is permitted to remove, without asking the consent of the Senate, officials to whose appointment the consent of the Senate is necessary. This was for a time regulated by statute, but the statute having been repealed the old usage has revived. (See Chapter V.)

Both the House and the Senate conduct their legislation by means of standing committees. This vital peculiarity of the American system of government has no firmer basis than the standing orders of each House, which can be repealed at any moment, but have been maintained for many years.

The Speaker of the House is by a similar practice entrusted with the profoundly important power of nominating all the House committees.

The chairmen of the chief committees of both Houses, which control the great departments of State (*e.g.* foreign affairs, navy, justice, finance), have practically become an additional set of ministers for those departments.

The custom of going into caucus, by which the parties in each of the two Houses of Congress determine their action, and the obligation on individual members to obey the decision of the caucus meeting, are mere habits or understandings, without legal sanction. So is the right claimed by the senators from a State to control the Federal patronage of that State. So is the usage that appropriation bills shall be presented to the House.

The rule that a member of Congress must be chosen from

the district, as well as from the State, in which he resides, rests on no Federal enactment; indeed, neither Congress nor any State legislature would be entitled thus to narrow the liberty of choice which the words of the Constitution imply.

Jackson introduced, and succeeding Presidents continued, the practice of dismissing Federal officials belonging to the opposite party, and appointing none but adherents of their own party to the vacant places. This is the so-called Spoils System, which, having been applied also to State and municipal offices, has been made the corner-stone of "practical politics" in America. The Constitution is nowise answerable for it and legislation only partially.

Neither in English law nor in American is there anything regarding the re-eligibility of a member of the popular chamber; nor can it be said that usage has established in either country any broad general rule on the subject. But whereas the English tendency has been to re-elect a member unless there is some positive reason for getting rid of him, in many parts of America men are disposed the other way, and refuse to re-elect him just because he has had his turn already. Any one can understand what a difference this makes in the character of the chamber.

We see, then, that several salient features of the present American government, such as the popular election of the President, the influence of senators and congressmen over patronage, the immense power of the Speaker, the Spoils System, are due to usages which have sprung up round the Constitution and profoundly affected its working, but which are not parts of the Constitution, nor necessarily attributable to any specific provision which it contains. The most remarkable instance of all, the choice of presidential candidates by the great parties assembled in their National Conventions, will be fully considered in a later chapter.

One of the changes which the last seventy years have brought about is so remarkable as to deserve special mention. The Constitution contains no provisions regarding the electoral franchise in congressional elections save the three following: —

That the franchise shall in every State be the same as that by which the members of the "most numerous branch of the State legislature" are chosen (Art. i. § 2).

That when any male citizens over twenty-one years of age are excluded by any State from the franchise (except for crime) the basis of representation in Congress of that State shall be proportionately reduced (Am. xiv., 1868).

That "the right of citizens of the United States to vote shall not be denied or abridged on account of race, colour, or previous condition of servitude" (Am. xv., 1870).

Subject to these conditions every State may regulate the electoral franchise as it pleases.

In the first days of the Constitution the suffrage was in nearly all States limited by various conditions (*e.g.* property qualification, length of residence, etc.) which excluded, or might have excluded, though in some States the proportion of very poor people was small, a considerable number of the free inhabitants. At present the suffrage is in every State practically universal. It had become so in the free States [1] even before the war. Here is an advance towards pure democracy effected without the action of the National legislature, but solely by the legislation of the several States, a legislation which, as it may be changed at any moment, is, so far as the National government is concerned, mere custom. And of this great step, modifying profoundly the colour and character of the government, there is no trace in the words of the Constitution other than the provisions of the fourteenth and fifteenth amendments introduced for the benefit of the liberated Negroes.

Sometimes the courts feel bound to declare some statute, or executive act done in pursuance of usage, contrary to the Constitution. What happens? In theory the judicial determination is conclusive, and ought to check any further progress in the path which has been pronounced unconstitutional. But whether this result follows will in practice depend on the circumstances of the moment. If the case is not urgent, if there is no strong popular impulse behind Congress or the President, no paramount need for the usage which had sprung up and is now disapproved, the decision of the courts will be acquiesced in; and whatever tendency towards change exists will seek some other channel where no constitutional obstacle bars its course. But if the needs of the time be pressing, courts and

[1] Save that in many of them persons of colour were placed at a disadvantage.

Constitution may have to give way. *Salus reipublicae lex suprema.* Above that supreme written law stands the safety of the commonwealth, which will be secured, if possible in conformity with the Constitution; but if that be not possible, then by evading, or even by overriding the Constitution.[1] This is what happened in the Civil War, when men said that they would break the Constitution in order to preserve it.

Attempts to disobey the Constitution have been rare, because the fear of clashing with it has arrested many mischievous proposals in their earlier stages, while the influence of public opinion has averted possible collisions by leading the courts to lend their ultimate sanction to measures or usages which, had they come under view at their first appearance, might have been pronounced unconstitutional.[2] That collisions have been rare is good evidence of the political wisdom of American statesmen and lawyers.

The solemn determination of a people enacting a fundamental law by which they and their descendants shall be governed cannot prevent that law, however great the reverence they continue to profess for it, from being worn away in one part, enlarged in another, modified in a third, by the ceaseless action of influences playing upon the individuals who compose the people. Thus the American Constitution has necessarily changed as the nation has changed, has changed in the spirit with which men regard it, and therefore in its own spirit. To use the words of the eminent constitutional lawyer whom I have more than once quoted: "We may think," says Judge Cooley, "that we have the Constitution all before us; but for

[1] In a remarkable letter written to Mr. Hodges (4th April 1864), President Lincoln said: "My oath to preserve the Constitution imposed on me the duty of preserving by every indispensable means that government, that nation, of which the Constitution was the organic law. Was it possible to lose the nation and yet preserve the Constitution? By general law life and limb must be protected, yet often a limb must be amputated to save a life, but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation. Right or wrong I assumed this ground, and now avow it. I could not feel that to the best of my ability I had even tried to preserve the Constitution, if, to save slavery, or any minor matter, I should permit the wreck of government, country, and Constitution altogether."

[2] Such as the expenditure of vast sums on "internal improvements" and the assumption of wide powers over internal communications.

practical purposes the Constitution is that which the government, in its several departments, and the people in the performance of their duties as citizens, recognize and respect as such; and nothing else is. . . . Cervantes says: Every one is the son of his own works. This is more emphatically true of an instrument of government than it can possibly be of a natural person. What it takes to itself, though at first unwarrantable, helps to make it over into a new instrument of government, and it represents at last the acts done under it."

CHAPTER XXXIII

THE RESULTS OF CONSTITUTIONAL DEVELOPMENT

We have seen that the American Constitution has changed, is changing, and by the law of its existence must continue to change, in its substance and practical working even when its words remain the same. "Time and habit," said Washington, "are at least as necessary to fix the true character of governments as of other human institutions:"[1] and while habit fixes some things, time remoulds others.

It remains to ask what has been the general result of the changes it has suffered, and what light an examination of its history, in this respect, throws upon the probable future of the instrument and on the worth of rigid or supreme constitutions in general.

The Constitution was avowedly created as an instrument of checks and balances. Each branch of the National government was to restrain the others, and maintain the equipoise of the whole. The legislature was to balance the executive, and the judiciary both. The two Houses of the legislature were to balance one another. The National government, taking all its branches together, was balanced against the State governments. As this equilibrium was placed under the protection of a document, unchangeable save by the people themselves, no one of the branches of the National government has been able to absorb or override the others, as the House of Commons and the Cabinet, itself a child of the House of Commons, have in England overridden and subjected the Crown and the House of Lords. Each branch maintains its independence, and can, within certain limits, defy the others.

But there is among political bodies and offices (*i.e.* the persons who from time to time fill the same office) of necessity a

[1] Farewell Address, 17th September 1796.

constant strife, a struggle for existence similar to that which Mr. Darwin has shown to exist among plants and animals; and as in the case of plants and animals so also in the political sphere this struggle stimulates each body or office to exert its utmost force for its own preservation, and to develop its aptitudes in any direction wherein development is possible. Each branch of the American government has striven to extend its range and its powers; each has advanced in certain directions, but in others has been restrained by the equal or stronger pressure of other branches. I shall attempt to state the chief differences perceptible between the ideas which men entertained regarding the various bodies and offices of the government when they first entered life, and the aspect they now wear to the nation.

The President has developed a capacity for becoming, in moments of National peril, something like a Roman dictator. He is in quiet times no stronger than he was at first, possibly weaker. Congress has in some respects encroached on him, yet his office has shown that it may, in the hands of a trusted leader and at the call of a sudden necessity, rise to a tremendous height.

The ministers of the President have not become more important either singly or collectively as a Cabinet. Cut off from the legislature on one side, and from the people on the other, they have been a mere appendage to the President.

The Senate has come to press heavily on the executive, and at the same time has developed legislative functions which, though contemplated in the Constitution, were comparatively rudimentary in the older days. It has, in the judgment of American publicists, grown relatively stronger than it then was.

The Vice-President of the United States has become even more insignificant than the Constitution seemed to make him.

On the other hand, the Speaker of the House of Representatives, whom the Constitution mentions only once and on whom it bestows no power, has now secured one of the leading parts in the piece, and can affect the course of legislation more than any other single person.

An oligarchy of chairmen of the leading committees has sprung up in the House of Representatives as a consequence

of the increasing demands on its time and of the working of the committee system.

The judiciary was deemed to be making large strides during the first forty years, because it established its claim to powers which, though doubtless really granted, had been but faintly apprehended in 1789. After 1830 the development of those powers advanced more slowly. But the position which the Supreme Court has taken in the scheme of government, if it be not greater than the framers of the Constitution would have wished, is yet greater than they foresaw.

Although some of these changes are considerable, they are far smaller than those which England has seen pass over her government since 1789. So far, therefore, the rigid Constitution has maintained a sort of equilibrium between the various powers, whereas that which was then supposed to exist in England between the King, the peers, the House of Commons, and the people (*i.e.* the electors) has vanished irrecoverably.

In the other struggle that has gone on in America, that between the National government and the States, the results have been still more considerable, though the process of change has sometimes been interrupted. During the first few decades after 1789 the States, in spite of a steady and often angry resistance, sometimes backed by threats of secession, found themselves more and more entangled in the network of Federal powers which sometimes Congress, sometimes the President, sometimes the judiciary as the expounder of the Constitution, flung over them. Provisions of the Constitution whose bearing had been inadequately realized in the first instance were put in force against a State, and when once put in force became precedents for the future. It is instructive to observe that this was done by both of the great National parties, by those who defended State rights and preached State sovereignty as well as by the advocates of a strong central government. For the former, when they saw the opportunity of effecting, by means of the central legislative or executive power, an object of immediate party importance, did not hesitate to put in force that central power, forgetful or heedless of the example they were setting.

It is for this reason that the process by which the National government has grown may be called a natural one. A politi-

cal force has, like a heated gas, a natural tendency to expansion, a tendency which works even apart from the knowledge and intentions of those through whom it works. In the process of expansion such a force may meet, and may be checked, or driven back by a stronger force.

The expansive force of the National government proved ultimately stronger than the force of the States, so the centralizing tendency prevailed. And it prevailed not so much by the conscious purpose of the party disposed to favour it, as through the inherent elements of strength which it possessed, and the favouring conditions amid which it acted, elements and conditions largely irrespective of either political party, and operative under the supremacy of the one as well as of the other. Now and then the centralizing process was checked. Georgia defied the Supreme Court in 1830–2, and was not made to bend, because the executive sided with her. South Carolina defied Congress and the President in 1832, and the issue was settled by a compromise. Acute foreign observers then and often during the period that followed predicted the dissolution of the Union. For some years before the outbreak of the Civil War the tie of obedience to the National government was palpably loosened over a large part of the country. But during and after the war the former tendency resumed its action, swifter and more potent than before.

A critic may object to the view here presented by remarking that the struggle between the National government and the States has not, as in the case of the struggles between different branches of the National government, proceeded merely by the natural development of the Constitution, but has been accelerated by specific changes in the Constitution, viz. those made by the three latest amendments.

This is true. But the dominance of the centralizing tendencies is not wholly or even mainly due to those amendments. It had begun before them. It would have come about, though less completely, without them. It has been due not only to these amendments but also —

To the extensive interpretation by the judiciary of the powers which the Constitution vests in the National government.

To the passing by Congress of statutes on topics not exclusively reserved to the States, statutes which have sensibly narrowed the field of State action.

To exertions of executive power which, having been approved by the people, and not condemned by the courts, have passed into precedents.

These have been the modes in which the centralizing tendency has shown itself and prevailed. What have been the underlying causes?

They belong to history. They are partly economical, partly moral. Steam and electricity have knit the various parts of the country closely together, have made each State and group of States more dependent on its neighbours, have added to the matters in which the whole country benefits by joint action and uniform legislation. The power of the National government to stimulate or depress commerce and industries by tariff legislation has given it a wide control over the material prosperity of part of the Union, till "the people, and especially the trading and manufacturing classes, came to look more and more to the National capital for what enlists their interests, and less and less to the capital of their own State. . . . It is the nation and not the State that is present to the imagination of the citizens as sovereign, even in the States of Jefferson and Calhoun. . . . The Constitution as it is, and the Union as it was, can no longer be the party watchword. There is a new Union, with new grand features, but with new engrafted evils."[1] There has grown up a pride in the National flag, and in the National government as representing National unity. In the North there is gratitude to that government as the power that saved the Union in the Civil War; in the South a sense of the strength which Congress and the President then exerted; in both a recollection of the immense scope which the war powers took and might take again. All over the country there is a great army of Federal office-holders who look to Washington as the centre of their hopes and fears. As the modes in and by which these and other similar causes can work are evidently not exhausted, it is clear that the development of the Constitution as between the nation and the States has not

[1] Cooley, *History of Michigan.*

yet stopped, and present appearances suggest that the centralizing tendency will continue to prevail.

To expect any form of words, however weighbily conceived, with whatever sanctions enacted, permanently to restrain the passions and interests of men is to expect the impossible. Beyond a certain point, you cannot protect the people against themselves any more than you can, to use a familiar American expression, lift yourself from the ground by your own bootstraps. Laws sanctioned by the overwhelming physical power of a despot, laws sanctioned by supernatural terrors whose reality no one doubted, have failed to restrain those passions in ages of slavery and superstition. The world is not so much advanced that in this age laws, even the best and most venerable laws, will of themselves command obedience. Constitutions which in quiet times change gradually, peacefully, almost imperceptibly, must in times of revolution be changed more bodily, some provisions being sacrificed for the sake of the rest, as mariners throw overboard part of the cargo in a storm in order to save the other part with the ship herself. To cling to the letter of a Constitution when the welfare of the country for whose sake the Constitution exists is at stake, would be to seek to preserve life at the cost of all that makes life worth having.

Nevertheless the rigid Constitution of the United States has rendered, and renders now, inestimable services. It opposes obstacles to rash and hasty change. It secures time for deliberation. It forces the people to think seriously before they alter it or pardon a transgression of it. It makes legislatures and statesmen slow to overpass their legal powers, slow even to propose measures which the Constitution seems to disapprove. It tends to render the inevitable process of modification gradual and tentative, the result of admitted and growing necessities rather than of restless impatience. It altogether prevents some changes which a temporary majority may clamour for, but which will have ceased to be demanded before the barriers interposed by the Constitution have been overcome.

It does still more than this. It forms the mind and temper of the people. It trains them to habits of legality. It strengthens their conservative instincts, their sense of the value of stability and permanence in political arrangements. It makes them feel

that to comprehend their supreme instrument of government is a personal duty, incumbent on each one of them. It familiarizes them with, it attaches them by ties of pride and reverence to, those fundamental truths on which the Constitution is based.

These are enormous services to render to any free country, but above all to one which, more than any other, is governed not by the men of rank or wealth or special wisdom, but by public opinion, that is to say, by the ideas and feelings of the people at large. In no country were swift political changes so much to be apprehended, because nowhere has material growth been so rapid and immigration so enormous. In none might the political character of the people have seemed more likely to be bold and prone to innovation, because their National existence began with a revolution, which even now lies only a century behind. That none has ripened into a more prudently conservative temper may be largely ascribed to the influence of the famous instrument of 1789, which, enacted by and for a new republic, summed up so much of what was best in the laws and customs of an ancient monarchy.

PART II

THE STATE GOVERNMENTS

CHAPTER XXXIV

NATURE OF THE AMERICAN STATE

The American State is a peculiar organism, unlike anything in modern Europe or in the ancient world. The only parallel is to be found in the cantons of modern Switzerland.

Let me attempt to sketch the American States as separate political entities, forgetting for the moment that they are also parts of a federation.

The older colonies had different historical origins. Virginia and North Carolina were unlike Massachusetts and Connecticut; New York, Pennsylvania, and Maryland different from both; while in recent times the stream of European immigration has filled some States with Irishmen, others with Germans, others with Scandinavians, and has left most of the Southern States wholly untouched.

Nevertheless, the form of government is in its main outlines, and to a large extent even in its actual working, the same in all these forty-five Republics, and the differences, instructive as they are, relate to points of secondary consequence.

The States fall naturally into five groups: —

The New England States — Massachusetts, Connecticut, Rhode Island, New Hampshire, Vermont, Maine.

The Middle States — New York, New Jersey, Pennsylvania, Delaware,[1] Maryland, Ohio, Indiana.[2]

The Southern, or old slave States — Virginia, West Virginia (separated from Virginia during the war), North Caro-

[1] Delaware and Maryland were slave States, but did not secede, and are in some respects to be classed rather with the Middle than with the Southern group, as indeed are West Virginia and Missouri, perhaps even Tennessee and Kentucky.

[2] Ohio and Indiana are becoming rather Middle than Western, but many people would still class them among Western States.

lina, South Carolina, Georgia, Alabama, Florida, Kentucky, Tennessee, Mississippi, Louisiana, Arkansas, Missouri, Texas.

The North-western States — Michigan, Illinois, Wisconsin, Minnesota, Iowa, Nebraska, Kansas, Colorado, North Dakota, South Dakota, Wyoming, Montana, Idaho, Utah.

The Pacific States — California, Nevada, Oregon, Washington.

Each of these groups has something distinctive in the character of its inhabitants, which is reflected, though more faintly now than formerly, in the character of its government and politics.

New England is the old home of Puritanism, the traces whereof, though waning under the influence of Irish and French Canadian immigration, are by no means yet extinct. The Southern States will long retain the imprint of slavery, not merely in the presence of a host of Negroes, but in the degradation of the poor white population, and in certain attributes, laudable as well as regrettable, of the ruling class. The North-west is the land of hopefulness, and consequently of bold experiments in legislation: its rural inhabitants have the honesty and narrow-mindedness of agriculturists. The Pacific West, or rather California and Nevada, for Oregon and Washington belong in character to the Upper Mississippi or North-western group, tinges the energy and sanguine good nature of the Westerns with a speculative recklessness natural to mining communities, where great fortunes have rapidly grown and vanished, and into which elements have been suddenly swept together from every part of the world, as a Rocky Mountain rainstorm fills the bottom of a valley with sand and pebbles from all the surrounding heights.

As the dissimilarity of population and of external conditions seems to make for a diversity of constitutional and political arrangements between the States, so also does the large measure of legal independence which each of them enjoys under the Federal Constitution. No State can, as a commonwealth, politically deal with or act upon any other State. No diplomatic relations can exist nor treaties be made between States,

no coercion can be exercised by one upon another. And although the government of the Union can act on a State, it rarely does act, and then only in certain strictly limited directions, which do not touch the inner political life of the commonwealth.

Let us pass on to consider the circumstances which work for uniformity among the States, and work more powerfully as time goes on.

He who looks at a map of the Union will be struck by the fact that so many of the boundary lines of the States are straight lines. Those lines tell the same tale as the geometrical plans of cities like St. Petersburg or Washington, where every street runs at the same angle to every other. The States are not natural growths. Their boundaries are for the most part not natural boundaries fixed by mountain ranges, nor even historical boundaries due to a series of events, but purely artificial boundaries, determined by an authority which carved the National territory into strips of convenient size, as a building company lays out its suburban lots. Of the States subsequent to the original thirteen, California is the only one with a genuine natural boundary, finding it in the chain of the Sierra Nevada on the east and the Pacific Ocean on the west. No one of these later States can be regarded as a naturally developed political organism. They are trees planted by the forester, not self-sown with the help of the seed-scattering wind. This absence of physical lines of demarcation has tended and must tend to prevent the growth of local distinctions. Nature herself seems to have designed the Mississippi basin, as she has designed the unbroken levels of Russia, to be the dwelling-place of one people.

Each State makes its own Constitution; that is, the people agree on their form of government for themselves, with no interference from the other States or from the Union. This form is subject to one condition only: it must be republican.[1] But in each State the people who make the Constitution have lately come from other States, where they have lived under

[1] The case of Kansas immediately before the War of Secession, and the cases of the seceding States, which were not readmitted after the war till they had accepted the constitutional amendments forbidding slavery and protecting the freedmen, are quite exceptional.

and worked constitutions which are to their eyes the natural and almost necessary model for their new State to follow; and in the absence of an inventive spirit among the citizens, it was the obvious course for the newer States to copy the organizations of the older States, especially as these agreed with certain familiar features of the Federal Constitution. Hence the outlines, and even the phrases of the elder constitutions reappear in those of the more recently formed States. The precedents set by Virginia, for instance, had much influence on Tennessee, Alabama, Mississippi, and Florida, when they were engaged in making or amending their constitutions during the early part of this century.

Nowhere is population in such constant movement as in America. In some of the newer States only one-fourth or one-fifth of the inhabitants are natives of the United States. Many of the townsfolk, not a few even of the farmers, have been till lately citizens of some other State, and will, perhaps, soon move on farther west. These Western States are like a chain of lakes through which there flows a stream which mingles the waters of the higher with those of the lower. In such a constant flux of population local peculiarities are not readily developed, or if they have grown up when the district was still isolated, they disappear as the country becomes filled. Each State takes from its neighbours and gives to its neighbours, so that the process of assimilation is always going on over the whole wide area.

Still more important is the influence of railway communication, of newspapers, of the telegraph. A Greek city like Samos or Mitylene, holding her own island, preserved a distinctive character in spite of commercial intercourse and the sway of Athens. A Swiss canton like Uri or Appenzell, entrenched behind its mountain ramparts, remains, even now under the strengthened central government of the Swiss nation, unlike its neighbours of the lower country. But an American State, traversed by great trunk lines of railway and depending on the markets of the Atlantic cities and of Europe for the sale of its grain, cattle, bacon, and minerals, is attached by a hundred always tightening ties to other States, and touched by their weal or woe as nearly as by what befalls within its own limits. The leading newspapers are read over a vast

area. The inhabitants of each State know every morning the events of yesterday over the whole Union.

Finally, the political parties are the same in all the States. The tenets of each party are (with some slight exceptions) the same everywhere, their methods the same, their leaders the same, although of course a prominent man enjoys especial influence in his own State. Hence, State politics are largely swayed by forces and motives external to the particular State, and common to the whole country, or two great sections of it; and the growth of local parties, the emergence of local issues, and development of local political schemes, are correspondingly restrained. These considerations explain why the States, notwithstanding the original diversities between some of them, and the wide scope for political divergence which they all enjoy under the Federal Constitution, are so much less dissimilar and less peculiar than might have been expected.

Each of the States has its own —

Constitution.
Executive, consisting of a governor and various other officials.
Legislature of two Houses.
System of local government in counties, cities, townships, and school districts.
System of State and local taxation.
Debts, which it may repudiate at its own pleasure.
Body of private law, including the whole law of real and personal property, of contracts, of torts, and of family relations.
System of procedure, civil and criminal.
Court, from which no appeal lies (except in cases touching Federal legislation or the Federal Constitution) to any Federal court.
Citizenship, which may admit persons (*e.g.* recent immigrants) to be citizens at times, or on conditions, wholly different from those prescribed by other States.

Three points deserve to be noted as illustrating what these ttributes include.

I. A man gains active citizenship of the United States *i.e.* a share in the government of the Union) only by becomng a citizen of some particular State. Being such citizen, he

is forthwith entitled to the National franchise. That is to say, voting power in the State carries voting power in Federal elections, and however lax a State may be in its grant of such power, *e.g.* to foreigners just landed or to persons convicted of crime, these State voters will have the right of voting in congressional and presidential elections.[1] The only restriction on the States in this matter is that of the fourteenth and fifteenth constitutional amendments. They were intended to secure equal treatment to the Negroes, and incidentally they declare the protection given to all citizens of the United States. Whether they really enlarge it, that is to say, whether it did not exist by implication before, is a legal question, which I need not discuss.

II. The power of a State over all communities within its limits is absolute. It may grant or refuse local government as it pleases. The population of the city of Providence is more than one-third of that of the State of Rhode Island, the population of New York City one-fourth that of the State of New York. But the State might in either case extinguish the municipality, and govern the city by a single State commissioner appointed for the purpose, or leave it without any government whatever. The city would have no right of complaint to the Federal President or Congress against such a measure. Massachusetts lately remodelled the city government of Boston just as the British Parliament might remodel that of Birmingham.

III. A State commands the allegiance of its citizens, and may punish them for treason against it. The power has rarely been exercised, but its undoubted legal existence had much to do with inducing the citizens of the Southern States to follow their governments into secession in 1861. They conceived

[1] Congress has power to pass a uniform rule of naturalization (Const. Art. i. § 8).

Under the present naturalization laws a foreigner must have resided in the United States for five years, and for one year in the State or Territory where he seeks admission to United States citizenship, and must declare two years before he is admitted that he renounces allegiance to any foreign prince or State. Naturalization makes him a citizen not only of the United States but of the State or Territory where he is admitted, but does not necessarily confer the electoral franchise, for that depends on State laws.

In more than a third of the States the electoral franchise is now enjoyed by persons not naturalized as United States citizens.

themselves to owe allegiance to the State as well as to the Union, and when it became impossible to preserve both, because the State had declared its secession from the Union, they might hold the earlier and nearer authority to be paramount. Allegiance to the State must now, since the war, be taken to be subordinate to allegiance to the Union. But allegiance to the State still exists; treason against the State is still possible.

These are illustrations of the doctrine that the American States were originally in a certain sense, and still for certain purposes remain, sovereign States. Each of the original thirteen became sovereign (so far as its domestic affairs were concerned, though not as respects international relations) when it revolted from the mother country in 1776. By entering the Confederation of 1781–8 it parted with one or two of the attributes of sovereignty; by accepting the Federal Constitution in 1788–91 it subjected itself for certain specified purposes to a central government, but claimed to retain its sovereignty for all other purposes. That is to say, the authority of a State is an inherent, not a delegated, authority. It has all the powers which any independent government can have, except such as it can be affirmatively shown to have stripped itself of, while the Federal government has only such powers as it can be affirmatively shown to have received. To use the legal expression, the presumption is always for a State, and the burden of proof lies upon any one who denies its authority in a particular matter.[1]

What State sovereignty means and includes was a question which incessantly engaged the most active legal and political minds of the nation, from 1789 down to 1870. Some thought it paramount to the rights of the Union. Some considered it

[1] As the colonies had associated themselves into a league, at the very time at which they revolted from the British Crown, and as their foreign relations were always managed by the authority and organs of this league, no one of them ever was for international purposes a free and independent sovereign State. Abraham Lincoln was in this sense justified in saying that the Union was older than the States, and had created them as States. But what are we to say of North Carolina and Rhode Island, after the acceptance of the Constitution of 1787–9 by the other eleven States? They were out of the old Confederation, for it had expired. They were not in the new Union, for they refused during many months to enter it. What else can they have been during those months except sovereign commonwealths?

as held in suspense by the Constitution, but capable of reviving as soon as a State should desire to separate from the Union. Some maintained that each State had in accepting the Constitution finally renounced its sovereignty, which thereafter existed only in the sense of such an undefined domestic, legislative, and administrative authority as had not been conferred upon Congress. The conflict of these views, which became acute in 1832 when South Carolina claimed the right of nullification, produced secession and the war of 1861–5. Since the defeat of the Secessionists, the last of these views may be deemed to have been established, and the term "State sovereignty" is now but seldom heard. Even "States' rights" have a different meaning from that which they had thirty years ago.

The Constitution of 1789 was a compromise, and a compromise arrived at by allowing contradictory propositions to be represented as both true. To every one who urged that there were thirteen States, and therefore thirteen governments, it was answered, and truly, that there was one government, because the people were one. To every one who declared that there was one government, it was answered with no less truth that there were thirteen. Thus counsel was darkened by words without knowledge; the question went off into metaphysics, and found no end, in wandering mazes lost.

There was, in fact, a divergence between the technical and the practical aspects of the question. Technically, the seceding States had an arguable case; and if the point had been one to be decided on the construction of the Constitution as a court decides on the construction of a commercial contract, they were possibly entitled to judgment. Practically, the defenders of the Union stood on firmer ground, because circumstances had changed since 1789 so as to make the nation more completely one nation than it then was, and had so involved the fortunes of the majority which held to the Union with those of the minority seeking to depart, that the majority might feel justified in forbidding their departure. Stripped of legal technicalities, the dispute resolved itself into the problem often proposed but capable of no general solution: When is a majority entitled to use force for the sake of retaining a minority in the same political body with itself?

To this question, when it appears in a concrete shape, as to the similar question when an insurrection is justifiable, an answer can seldom be given beforehand. The result decides. When treason prospers, none dare call it treason.

What, then, do the rights of a State now include? Every right or power of a government except —

The right of secession (not abrogated in terms, but admitted since the war to be no longer claimable. It is expressly negatived in the recent Constitutions of several Southern States).

Powers which the Constitution withholds from the States (including that of intercourse with foreign governments).

Powers which the Constitution expressly confers on the Federal government.

As respects some powers of the last class, however, the States may act concurrently with, or in default of action by, the Federal government. It is only from contravention of its action that they must abstain. And where contravention is alleged to exist, whether legislative or executive, it is by a court of law, and, in case the decision is in the first instance favourable to the pretensions of the State, ultimately by a Federal court, that the question is decided.

Looking at this immense compass of State functions, Jefferson would seem to have been not far wrong when he said that the Federal government was nothing more than the American department of foreign affairs. But although the National government touches the direct interests of the citizen less than does the State government, it touches his sentiment more. Hence the strength of his attachment to the former and his interest in it must not be measured by the frequency of his dealings with it. In the partitionment of governmental functions between nation and State, the State gets the most but the nation the highest, so the balance between the two is preserved.

Thus every American citizen lives in a duality of which Europeans, always excepting the Swiss, and to some extent the Germans, have no experience. He lives under two governments and two sets of laws; he is animated by two patriotisms

and owes two allegiances. That these should both be strong and rarely be in conflict is most fortunate. It is the result of skilful adjustment and long habit, of the fact that those whose votes control the two sets of governments are the same persons, but above all of that harmony of each set of institutions with the other set, a harmony due to the identity of the principles whereon both are founded, which makes each appear necessary to the stability of the other, the States to the nation as its basis, the National government to the States as their protector.

CHAPTER XXXV

STATE CONSTITUTIONS

The government of each of the forty-five States is determined by and set forth in its Constitution, a comprehensive fundamental law, or rather group of laws included in one instrument, which has been directly enacted by the people of the State, and is capable of being repealed or altered, not by their representatives, but by themselves alone. As the Constitution of the United States stands above Congress and out of its reach, so the Constitution of each State stands above the legislature of that State, cannot be varied in any particular by the State legislature, and involves the invalidity of any statute passed by that legislature which is found to be inconsistent with it.

The State Constitutions are the oldest things in the political history of America, for they are the continuations and representatives of the royal colonial charters, whereby the earliest English settlements in America were created, and under which their several local governments were established, subject to the authority of the English Crown and ultimately of the British Parliament. But, like most of the institutions under which English-speaking peoples now live, they have a pedigree which goes back to a time anterior to the discovery of America itself. It begins with the English trade guild of the Middle Ages, itself the child of still more ancient corporations, dating back to the days of imperial Rome, and formed under her imperishable law. Charters were granted to merchant guilds in England as far back as the days of King Henry I. Edward IV. gave an elaborate one to the Merchant Adventurers trading with Flanders in 1463. In it we may already discern the arrangements which are more fully set forth in two later charters of greater historical interest, the charter of Queen Elizabeth to the East India Company in

1599, and the charter of Charles I. to the "Governor and Company of the Massachusetts Bay in Newe-England" in 1628. Both these instruments establish and incorporate trading companies, with power to implead and be impleaded, to use a common seal, to possess and acquire lands, tenements, and hereditaments, with provisions for the making of ordinances for the welfare of the company.

The Massachusetts Charter creates a frame of government, consisting of a governor, deputy-governor, and eighteen assistants (the term still in use in many of the London city guilds), and directs them to hold four times a year a general meeting of the company, to be called the "greate and generall Court," in which general court "the Governor or deputie Governor, and such of the assistants and Freemen of the Company as shall be present, shall have full power and authority to choose other persons to be free of the Company, and to elect and constitute such officers as they shall thinke fit for managing the affaires of the saide Governor and Company, and to make Lawes and Ordinances for the Good and Welfare of the saide Company, and for the Government and Ordering of the saide Landes and Plantasion, and the People inhabiting and to inhabite the same, soe as such Lawes and Ordinances be not contrary or repugnant to the Lawes and Statuts of this our realme of England."

In 1691, the charter of 1628 having been declared forfeited in 1684, a new one was granted by King William and Queen Mary, and this instrument, while it retains much of the language and some of the character of the trade guild charter, is really a political frame of government for a colony. The assistants receive the additional title of councillors; their number is raised to twenty-eight; they are to be chosen by the general court, and the general court itself is to consist, together with the governor and assistants, of freeholders elected by towns or places within the colony, the electors being persons with a forty shilling freehold, or other property worth £40. The governor is directed to appoint judges, commissioners of oyer and terminer, etc.; the general court receives power to establish judicatories and courts of record, to pass laws (being not repugnant to the laws of England), and to provide for all necessary civil offices. An appeal from

the courts shall always be to the king in his privy council. This is a true political constitution.[1] Under it the colony was governed, and in the main well and wisely governed, till 1780. Much of it, not merely its terms, such as the name "general court," but its solid framework, was transferred bodily to the Massachusetts Constitution of 1780, which is now in force, and which profoundly influenced the Convention that prepared the Federal Constitution in 1787.

Yet the charter of 1691 is nothing but an extension and development of the trading charter of 1628, in which there already appears, as there had appeared in Edward IV.'s charter of 1463, and in the East India Company's charter of 1599, the provision that the power of law-giving, otherwise unlimited, should be restricted by the terms of the charter itself, which required that every law for the colony should be agreeable to the laws of England. We have therefore in the three charters which I have named, those of 1463, 1599, and 1628, as well as in that of 1691, the essential and capital characteristic of a rigid or supreme constitution — viz. a frame of government established by a superior authority, creating a subordinate law-making body, which can do everything except violate the terms and transcend the powers of the instrument to which it owes its own existence. So long as the colony remained under the British Crown, the superior authority, which could amend or remake the frame of government, was the British Crown or Parliament. When the connection with Britain was severed, that authority passed over, not to the State legislature, which remained limited, as it always had been, but to the people of the now independent commonwealth, whose will speaks through what is now the State Constitution, just as the will of the Crown or of Parliament had spoken through the charters of 1628 and 1691.

I have taken the case of Massachusetts as the best example of the way in which the trading company grows into a colony,

[1] The oldest truly political constitution in America is the instrument called the Fundamental Orders of Connecticut, framed by the inhabitants of Windsor, Hartford, and Wethersfield in 1638, memorable year, when the ecclesiastical revolt of Scotland saved the liberties of England. Connecticut was afterwards regularized by Charles II.'s charter of 1662 to "the Governor and Company of the English colony of Connecticut." The agreement drawn up in the cabin of the Mayflower may perhaps claim to have in it the germs of a government.

and the colony into a State. But some of the other colonies furnish illustrations scarcely less apposite. The oldest of them all, the acorn whence the oak of English dominion in America has sprung, the colony of Virginia, was, by the second charter, of 1609, established under the title of "The Treasurer and Company of Adventurers and Planters of the City of London for the first colony in Virginia."[1]

When, in 1776, the thirteen colonies threw off their allegiance to King George III., and declared themselves independent States, the colonial charter naturally became the State constitution.[2] In most cases it was remodelled, with large alterations, by the revolting colony. But in three States it was maintained unchanged, except, of course, so far as Crown authority was concerned, viz. in Massachusetts till 1780, in Connecticut till 1818, and in Rhode Island till 1842.[3] The

[1] The phrase First colony distinguishes what afterwards became the State of Virginia from the more northerly parts of Virginia, afterwards called New England. The Second colony was to be Plymouth, one of the two settlements which became Massachusetts.

[2] Even in declaring herself independent, New Jersey clung to the hope that the mother country would return to wiser counsels, and avert the departure of her children. She added at the end of her Constitution of 2d July 1776 the following proviso: "Provided always, and it is the true intent and meaning of this Congress, that if a reconciliation between Great Britain and these colonies should take place, and the latter be taken again under the protection and government of the Crown of Britain, this charter shall be null and void, otherwise remain firm and inviolable." The truth is that the colonists, till alienated by the behaviour of England, had more kindly feelings towards her than she had towards them. To them she was the old home, to her they were simply customers. Some interesting illustrations of the views then entertained as to the use of colonies may be found in the famous discussion in the fourth book of Adam Smith's *Wealth of Nations*, which appeared in 1776.

[3] Rhode Island simply passed a statute by her legislature, in May 1776, substituting allegiance to the colony for allegiance to the King. Connecticut passed the following statute: — "Be it enacted by the Governor and Council and House of Representatives, in general court assembled, that the ancient form of civil government contained in the charter from Charles II., King of England, and adopted by the people of this State, shall be and remain the civil Constitution of this State, under the sole authority of the people thereof, independent of any king or prince whatever; and that this republic is, and shall for ever be and remain, a free, sovereign, and independent State, by the name of the State of Connecticut." (Three paragraphs follow containing a short "Bill of Rights," and securing to the inhabitants of any other of the United States the same law and justice as natives of the State enjoyed.) This is all that Connecticut thought necessary. She had possessed, as did Rhode Island also, the right of appointing her own governor, and therefore did not need to substitute any new authority for a royal governor.

other States admitted to the Union in addition to the original thirteen, have entered it as organized self-governing communities, with their constitutions already made by their respective peoples. Each act of Congress which admits a new State admits it as a subsisting commonwealth, sometimes empowering its people to meet and enact a constitution for themselves (subject to conditions mentioned in the act), sometimes accepting and confirming a constitution so already made by the people.[1] Congress may impose conditions which the State constitution must fulfil; and in admitting the six newest States has affected to retain the power of maintaining these conditions in force. But the authority of the State constitutions does not flow from Congress, but from acceptance by the citizens of the States for which they are made. Of these instruments, therefore, no less than of the constitutions of the thirteen original States, we may say that although subsequent in date to the Federal Constitution, they are, so far as each State is concerned, *de jure* prior to it. Their authority over their own citizens is nowise derived from it.[2] Nor is this a mere piece of technical law. The antiquity of the older States as separate commonwealths, running back into the heroic ages of the first colonization of America and the days of the Revolutionary War, is a potent source of the local patriotism of their inhabitants, and gives these States a sense of historic growth and indwelling corporate life which they could not have possessed had they been the mere creatures of the Federal Government.

The State constitutions of America well deserve to be compared with those of the self-governing British colonies. But one remarkable difference must be noted here. The constitutions of British colonies have all proceeded from the Imperial Parliament of the United Kingdom, which retains its full

[1] In the Act of 1889 for the admission of North Dakota, South Dakota, Montana, and Washington the former course, in the admission of Idaho and Wyoming in 1890 the latter course, was followed.

[2] In practice Congress can influence the character of a State constitution, because a State whose constitution contains provisions which Congress disapproves may be refused admission. But since the extinction of slavery and completion of the process of reconstruction, occasions for the serious exercise of such a power rarely arise. It was used to compel the seceding States to modify their constitutions so as to get rid of all taint of slavery before their senators and representatives were readmitted to Congress after the war.

legal power of legislating for every part of the British dominions. In many cases a colonial constitution provides that it may be itself altered by the colonial legislature, of course with the assent of the Crown; but inasmuch as in its origin it is a statutory constitution, not self-grown, but planted as a shoot by the Imperial Parliament at home, Parliament may always alter or abolish it. Congress, on the other hand, has no power to alter a State constitution. And whatever power of alteration has been granted to a British colony is exercisable by the colonial legislature, not, as in America, by the citizens at large.

The original constitutions of the States, whether of the old thirteen or of the newer ones, have been in nearly every case (except those of the newest States) subsequently recast, in some instances five, six, or even seven times, as well as amended in particular points. Thus constitutions of all dates are now in force in different States, from that of Massachusetts, enacted in 1780, but largely amended since, to that of Utah, enacted in 1894.

The constitutions of the revolutionary period were in a few instances enacted by the State legislature, acting as a body with plenary powers, but more usually by the people acting through a convention, *i.e.* a body especially chosen by the voters at large for the purpose, and invested with full powers, not only of drafting, but of adopting the instrument of government.[1] Since 1835, when Michigan framed her constitution, the invariable practice in the Northern States has been for the convention, elected by the voters, to submit, in accordance with the precedents set by Massachusetts in 1780, and by Maine in 1820, the draft constitution framed by it to the citizens of the State at large, who voted upon it Yes or No. They usually vote on it as a whole, and adopt or reject it *en bloc*, but sometimes provision is made for voting separately on

[1] In Rhode Island and Connecticut the legislature continued the colonial constitution. In South Carolina a body calling itself the "Provincial Congress" claimed to be the "General Assembly," or legislature of the colony, and as such enacted the Constitution. In the other revolting colonies, except Massachusetts, conventions or congresses enacted the constitution, not submitting it to the voters for ratification. In Massachusetts the convention submitted its draft to the voters in 1780, and the voters adopted it, a previous draft tendered by the legislature in 1778 having been rejected.

some particular point or points. In the Southern States the practice has varied, but the growing tendency has been to submit the draft to the people. In 1890, however, Mississippi enacted a new Constitution by a convention alone; and in Kentucky (in 1891), after the draft Constitution which the convention had prepared had been submitted to and accepted by a popular vote (as provided by the statute which summoned the convention), the convention met again and made some alterations on which, strange to say, the people have not been since consulted.

The people of a State retain for ever in their hands, altogether independent of the National government, the power of altering their constitution. When a new constitution is to be prepared, or the existing one amended, the initiative usually comes from the legislature, which (either by a simple majority, or by a two-thirds majority, or by a majority in two successive legislatures, as the constitution may in each instance provide) submits the matter to the voters in one of two ways. It may either propose to the people certain specific amendments,[1] or it may ask the people to decide by a direct popular vote on the propriety of calling a constitutional convention to revise the whole existing constitution. In the former case the amendments suggested by the legislature are directly voted on by the citizens; in the latter the legislature, so soon as the citizens have voted for the holding of a convention, provides for the election by the people of this convention. When elected, the convention meets, sets to work, goes through the old constitution, and prepares a new one, which is then usually presented to the people for ratification or rejection at the polls. Only in the little State of Delaware is the function of amending the Constitution still left to the legislature without the subsequent ratification of a popular vote, subject, however, to the provision that changes must be passed by two successive legislatures, and must have been put before the people at the election of members for the second. Some States provide for the submission to the people at fixed inter-

[1] In New Hampshire the legislature has no power to propose amendments: the local authorities take the sense of the people every seven years as to the need for a revising convention. In some States the legislature can do so only after stated intervals, *e.g.* of five years.

vals, of seven, ten, sixteen, or twenty years, of the propriety of calling a convention to revise the constitution, so as to secure that the attention of the people shall be drawn to the question whether their scheme of government ought or ought not to be changed. Be it observed, however, that whereas the Federal Constitution can be amended only by a vote of three-fourths of the States, a constitution can in nearly every State be changed by a bare majority of the citizens voting at the polls.[1] Hence we may expect, and shall find, that these instruments are altered more frequently and materially than the Federal Constitution has been.

The tendency of late years has been to make the process of alteration quicker; for recent constitutions generally provide that one legislature, not two successive legislatures, may propose an amendment, which shall at once take effect if accepted.

A State constitution is not only independent of the central National government (save in certain points already specified), it is also the fundamental organic law of the State itself. The State exists as a commonwealth by virtue of its constitution, and all State authorities, legislative, executive, and judicial, are the creatures of, and subject to, the State constitution. Just as the President and Congress are placed beneath the Federal Constitution, so the governor and Houses of a State are subject to its constitution, and any act of theirs done either in contravention of its provisions, or in excess of the powers it confers on them, is absolutely void. All that has been said in preceding chapters regarding the functions of the courts of law where an act of Congress is alleged to be inconsistent with the Federal Constitution, applies equally where a statute passed by a State legislature is alleged to transgress the constitution of the State, and of course such validity may be contested in any court, whether a State court or a Federal

[1] Sometimes, however, an absolute majority of all the qualified voters is required. In Rhode Island (where the voting is in town and ward meetings) a three-fifths majority is needed, and in South Carolina the ratification of the next elected legislature by a two-thirds majority in each House is necessary. In Delaware the proposal to call a convention must be approved by a majority of all the voters, in Kentucky by at least one-fourth of the total number who voted at the last preceding general election. Delaware having during several years failed in the attempt to amend her Constitution (of 1831) by the legislature, fell back, in 1887, on the proposal to hold a constitutional convention, but has not yet been able to secure a sufficiently large vote.

court, because the question is an ordinary question of law, and is to be solved by determining whether or no a law of inferior authority is inconsistent with a law of superior authority.

Whenever in any legal proceeding before any tribunal, either party relies on a State statute, and the other party alleges that this statute is *ultra vires* of the State legislature, and therefore void, the tribunal must determine the question just as it would determine whether a by-law made by a municipal council or a railway company was in excess of the law-making power which the municipality or the company had received from the higher authority which incorporated it and gave it such legislative power as it possesses. But although Federal courts are fully competent to entertain a question arising on the construction of a State constitution, their practice is to follow the precedent set by any decision of a court of the State in question, just as they would follow the decision of a French court in determining a point of French law. Each State must be assumed to know its own law better than a stranger can; and the Supreme Court of a State is held to be the authorized exponent of the mind of the people who enacted its Constitution.

A State constitution is really nothing but a law made directly by the people voting at the polls upon a draft submitted to them. The people when they so vote act as a primary and constituent assembly, just as if they were all summoned to meet in one place like the folkmoots of our Teutonic forefathers. It is only their numbers that prevent them from so meeting in one place, and oblige the vote to be taken at a variety of polling places. Hence the enactment of a constitution is an exercise of direct popular sovereignty to which we find few parallels in modern Europe, though it was familiar enough to the republics of antiquity, and has lasted till now in some of the cantons of Switzerland.

CHAPTER XXXVI

CONTENTS OF STATE CONSTITUTIONS

The importance of this character of a State constitution as a popularly enacted law, overriding every minor State law, becomes all the greater when the contents of these constitutions are examined. Europeans conceive of a constitution as an instrument, usually a short instrument, which creates a frame of government, defines its departments and powers, and declares the "primordial rights" of the subject or citizen as against the rulers. An American State constitution does this, but does more; and in most cases, infinitely more. It deals with a variety of topics which in Europe would be left to the ordinary action of the legislature, or of administrative authorities; and it pursues these topics into a minute detail hardly to be looked for in a fundamental instrument. Some of these details will be mentioned presently. Meantime I will sketch in outline the frame and contents of the more recent constitutions, reserving for the next chapter remarks on the differences of type between those of the older and those of the newer States.

A normal constitution consists of five parts: —

I. The definition of the boundaries of the State. (This does not occur in the case of the older States.)

II. The so-called Bill of Rights — an enumeration (whereof more anon) of the citizens' primordial rights to liberty of person and security of property. This usually stands at the beginning of the constitution, but occasionally at the end.

III. The frame of government — *i.e.* the names, functions, and powers of the legislative bodies (including provisions anent the elective suffrage), the executive officers, and the courts of justice.

IV. Miscellaneous provisions relating to administration

and law, including articles treating of education, of the militia, of taxation and revenue, of the public debts, of local government, of State prisons and hospitals, of agriculture, of labour, of impeachment, and of the method of amending the constitution, besides other matters still less political in their character. The order in which these occur differs in different instruments, and there are some in which some of the above topics are not mentioned at all. The more recent constitutions and those of the newer States are much fuller on these points.

V. The schedule, which contains provisions relating to the method of submitting the constitution to the vote of the people and arrangements for the transition from the previous constitution to the new one which is to be enacted by that vote. Being of a temporary nature, the schedule is not strictly a part of the constitution.

The Bill of Rights is historically the most interesting part of these constitutions, for it is the legitimate child and representative of Magna Charta, and of those other declarations and enactments, down to the Bill of Rights of the Act of 1 William and Mary, session 2, by which the liberties of Englishmen have been secured. Most of the thirteen colonies when they asserted their independence and framed their constitutions inserted a declaration of the fundamental rights of the people, and the example then set has been followed by the newer States, and, indeed, by the States generally in their most recent constitutions. Considering that all danger from the exercise of despotic power upon the people of the States by the executive has long since vanished, their executive authorities being the creatures of popular vote and nowadays rather too weak than too strong, it may excite surprise that these assertions of the rights and immunities of the individual citizen as against the government should continue to be repeated in the instruments of to-day. A reason may be found in the remarkable constitutional conservatism of the Americans, and in their fondness for the enunciation of the general maxims of political freedom. But it is also argued that these declarations of principle have a practical value, as asserting the rights of individuals and of minorities against arbitrary conduct by a majority in the legislature, which might, in the

absence of such provisions, be tempted at moments of excitement to suspend the ordinary law and arm the magistrates with excessive powers. They are therefore, it is held, still safeguards against tyranny; and they serve the purpose of solemnly reminding a State legislature and its officers of those fundamental principles which they ought never to overstep. Although such provisions certainly do restrain a legislature in ways which the British Parliament would find inconvenient, few complaints of practical evils thence arising are heard.

I may mention a few curious provisions which occur in some of these Bills of Rights.

All provide for full freedom of religious opinion and worship, and for the equality before the law of all religious denominations and their members; and many forbid the establishment of any particular church or sect, and declare that no public money ought to be applied in aid of any religious body or sectarian institution.

Louisiana (Constitution of 1879) declares that "all government of right originates with the people, is founded on their will alone, and is instituted solely for the good of the whole, deriving its just powers from the consent of the governed. Its only legitimate end is to protect the citizen in the enjoyment of life, liberty, and property. When it assumes other functions, it is usurpation and oppression."

Thirty-one States declare that "all men have a natural, inherent, and inalienable right to enjoy and defend life and liberty;" and all of these, except the melancholy Missouri, add the "natural right to pursue happiness."

Twenty-two declare that all men have "a natural right to acquire, possess, and protect property."

Kentucky (Constitution of 1891) lays down that "absolute arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority. All men when they form a social compact are equal. All power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, happiness, and security, and the protection of property. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter,

reform, or abolish their government in such manner as they may deem proper."

All in one form or another secure the freedom of writing and speaking opinions, and some add that the truth of a libel may be given in evidence.

Nearly all secure the freedom of public meeting and petition. Considering that these are the last rights likely to be infringed by a State government, it is odd to find Florida in her Constitution of 1886 providing that "the people shall have the right to assemble together to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances," and Kentucky in 1891 equally concerned to secure this right.

Many provide that no *ex post facto* law, nor law impairing the obligation of a contract, shall be passed by the State legislature; and that private property shall not be taken by the State without just compensation.

Many forbid the creation of any title of nobility.

Many declare that the right of citizens to bear arms shall never be denied, a provision which might be expected to prove inconvenient where it was desired to check the habit of carrying revolvers. Tennessee therefore (Constitution of 1870) prudently adds that "the legislature shall have power to regulate the wearing of arms, with a view to prevent crime." So also Texas, where such a provision is certainly not superfluous. And six others allow the legislature to forbid the carrying of concealed weapons.

Eight forbid white and coloured children to be taught in the same public schools, while Wyoming provides that no distinction shall be made in the public schools on account of sex, race, or colour.

Many declare the right of trial by jury to be inviolate, even while permitting the parties to waive it. Idaho empowers a jury in civil cases to render a verdict by a three-fourths majority, and Wyoming permits it to consist of less than twelve.

Some forbid imprisonment for debt, except in case of fraud, and secure the acceptance of reasonable bail, except for the gravest charges.

Several declare that "perpetuities and monopolies are con-

trary to the genius of a free State, and ought not to be allowed."

Many forbid the granting of any hereditary honours, privileges, or emoluments.

North Carolina declares that "as political rights and privileges are not dependent upon or modified by property, no property qualification ought to affect the right to vote or hold office;" and also, "secret political societies are dangerous to the liberties of a free people, and should not be tolerated."

Massachusetts sets forth, as befits a Puritan State, high moral views: "A frequent recurrence to the fundamental principles of the Constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty and to maintain a free government. The people ought consequently to have a particular attention to all those principles in the choice of their officers and representatives, and they have a right to require of their law-givers and magistrates an exact and constant observance of them."

South Dakota and Wyoming provide that aliens shall have the same rights of property as citizens. Montana confers this benefit as respects mining property, while Washington prohibits the ownership of land by aliens, except for mining purposes.

North Dakota (1889) enacts: "Every citizen shall be free to obtain employment wherever possible, and any person, corporation, or agent thereof, maliciously interfering or hindering in any way any citizen from obtaining or enjoying employment already obtained from any other corporation or person, shall be deemed guilty of a misdemeanour."

Maryland (Constitution of 1867) declares that "a long continuance in the executive departments of power or trust is dangerous to liberty; a rotation, therefore, in those departments is one of the best securities of permanent freedom." She also pronounces all gifts for any religious purpose (except of a piece of land not exceeding five acres for a place of worship, parsonage, or burying-ground) to be void unless sanctioned by the legislature.

Montana and Idaho declare the use of lands for constructing reservoirs, water-courses, or ways for the purposes of

mining or irrigation, to be a public use, subject to State regulation.

These instances, a few out of many, may suffice to show how remote from the common idea of a Bill of Rights, are some of the enactments which find a place under that heading. The constitution-makers seem to have inserted here such doctrines or legal reforms as seemed to them matters of high import or of wide application, especially when they could find no suitable place for them elsewhere in the instrument.

Of the articles of each State constitution which contain the frame of State government it will be more convenient to speak in the chapters which describe the mechanism and character of the governments and administrative systems of the several States. I pass on therefore to what have been classed as the Miscellaneous Provisions. These are of great interest as revealing the spirit and tendencies of popular government in America, the economic and social condition of the country, the mischiefs that have arisen, the remedies applied to these mischiefs, the ideas and beliefs of the people in matters of legislation.

Among such provisions we find a great deal of matter which is in no distinctive sense constitutional law, but general law, *e.g.* administrative law, the law of judicial procedure, the ordinary private law of family, inheritance, contract, and so forth; matter therefore which seems out of place in a constitution because fit to be dealt with in ordinary statutes. We find minute provisions regarding the management and liabilities of banking companies, of railways, or of corporations generally; regulations as to the salaries of officials, the quorum of courts sitting in banco, the length of time for appealing, the method of changing the venue, the publication of judicial reports; detailed arrangements for school boards and school taxation (with rules regarding the separation of white and black children in schools), for a department of agriculture, a canal board, or a labour bureau; we find a prohibition of lotteries, of polygamy, of bribery, of lobbying, of the granting of liquor licences, of usurious interest on money, an abolition of the distinction between sealed and unsealed instruments, a declaration of the extent of a mechanic's lien for work done. We even find the method prescribed in which stationery and

coals for the use of the legislature shall be contracted for, and provisions for fixing the rates which may be charged for the storage of corn in warehouses. The framers of these more recent constitutions have in fact neither wished nor cared to draw a line of distinction between what is proper for a constitution and what ought to be left to be dealt with by the State legislature. And, in the case of three-fourths at least of the States, no such distinction now, in fact, exists.

How is this confusion to be explained? Four reasons may be suggested.

The Americans, like the English, have no love for scientific arrangement. Although the constitutions have been drafted by lawyers, and sometimes by the best lawyers of each State, logical classification has not been sought after.

The people found the enactment of a new constitution a convenient opportunity for enunciating doctrines they valued and carrying through reforms they desired. It was a simpler and quicker method than waiting for legislative action, so, when there was a popular demand for the establishment of an institution, or for some legal change, this was shovelled into the new constitution and enacted accordingly.

The peoples of the States have come to distrust their respective legislatures. Hence they desire not only to do a thing forthwith and in their own way rather than leave it to the chance of legislative action, but to narrow as far as they conveniently can (and sometimes farther) the sphere of the legislature.

There is an unmistakable wish in the minds of the people to act directly rather than through their representatives in legislation. The same conscious relish for power which leads some democracies to make their representatives mere delegates, finds a further development in passing by the representatives, and setting the people itself to make and repeal laws.

Those who have read the chapters describing the growth and development of the Federal Constitution, will naturally ask how far the remarks there made apply to the constitutions of the several States.

These instruments have less capacity for expansion, whether by interpretation or by usage, than the Constitution of the

United States: firstly, because they are more easily, and therefore more frequently, amended or recast; secondly, because they are far longer, and go into much more minute detail. The Federal Constitution is so brief and general that custom must fill up what it has left untouched, and judicial construction evolve the application of its terms to cases they do not expressly deal with. But the later State constitutions are so full and precise that they need little in the way of expansive construction, and leave comparatively little room for the action of custom.

The rules of interpretation are in the main the same as those applied to the Federal Constitution. One important difference must, however, be noted, springing from the different character of the two governments. The National government is an artificial creation, with no powers except those conferred by the instrument which created it. A State government is a natural growth, which *prima facie* possesses all the powers incident to any government whatever. Hence, if the question arises whether a State legislature can pass a law on a given subject, the presumption is that it can do so: and positive grounds must be adduced to prove that it cannot. It may be restrained by some inhibition either in the Federal Constitution, or in the constitution of its own State. But such inhibition must be affirmatively shown to have been imposed, or, to put the same point in other words, a State constitution is held to be, not a document conferring defined and specified powers on the legislature, but one regulating and limiting that general authority which the representatives of the people enjoy *ipso jure* by their organization into a legislative body.

"It has never been questioned that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions. That must be conceded to be a fundamental principle in the political organization of the American States. We cannot well comprehend how, upon principle, it could be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several State legislatures, saving only such restrictions as are imposed

by the Constitution of the United States or of the particular State in question." [1]

"The people, in framing the constitution, committed to the legislature the whole law-making powers of the State which they did not expressly or impliedly withhold. Plenary power in the legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception." [2]

It must not, however, be supposed from these dicta that even if the States were independent commonwealths, the Federal government having disappeared, their legislatures would enjoy anything approaching the omnipotence of the British Parliament, "whose power and jurisdiction is," says Sir Edward Coke, "so transcendent and absolute that it cannot be confined, either for persons or causes, within any bounds." "All mischiefs and grievances," adds Blackstone, "operations and remedies that transcend the ordinary course of the laws are within the reach of this extraordinary tribunal." Parliament being absolutely sovereign, can command, or extinguish and swallow up the executive and the judiciary, appropriating to itself their functions. But in America, a legislature is a legislature and nothing more. The same instrument which creates it creates also the executive governor and the judges. They hold by a title as good as its own. If the legislature should pass a law depriving the governor of an executive function conferred by the constitution, that law would be void. If the legislature attempted to interfere with the jurisdiction of the courts, their action would be even more palpably illegal and ineffectual.[3]

The executive and legislative departments of a State government have of course the right and duty of acting in the first instance on their view of the meaning of the constitution.

[1] Redfield, Chief-Justice, in 27 Vermont Reports, p. 142, quoted by Cooley, *Constit. Limit.*, p. 108.

[2] Denio, Chief-Justice, in 15 N. Y. Reports, p. 543, quoted *ibid.* p. 107.

[3] It has, for instance, been held that a State legislature cannot empower election boards to decide whether a person has by duelling forfeited his right to vote or hold office, this inquiry being judicial and proper only for the regular tribunals of the State. — Cooley, *Constit. Limit.*, p. 112. Acts passed by legislatures affecting some judicial decision already given, have repeatedly been held void by the courts. They would be doubly void as also transgressing the Federal Constitution.

But the ultimate expounder of that meaning is the judiciary; and when the courts of a State have solemnly declared the true construction of any provision of the constitution, all persons are bound to regulate their conduct accordingly.

It is a well-established rule that the judges will always lean in favour of the validity of a legislative act; that if there be a reasonable doubt as to the constitutionality of a statute they will solve that doubt in favour of the statute; that where the legislature has been left a discretion they will assume the discretion to have been wisely exercised; that where the construction of a statute is doubtful, they will adopt such construction as will harmonize with the constitution, and enable it to take effect. So it has been well observed that a man might with perfect consistency argue as a member of a legislature against a bill on the ground that it is unconstitutional, and after having been appointed a judge, might in his judicial capacity sustain its constitutionality. Judges must not inquire into the motives of the legislature, nor refuse to apply an act because they may suspect that it was obtained by fraud or corruption, still less because they hold it to be opposed to justice and sound policy. "A court cannot declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited, or such rights guaranteed or protected, by the Constitution.[1] . . . But when a statute is adjudged to be unconstitutional, it is as if it had

[1] This was not always admitted; just as in England it was at one time held that natural justice and equity were above acts of Parliament. So in the case of *Gardner* v. *The Village of Newburg* (Johnson's *Chancery Reports*, N. Y. 162), the New York legislature had authorized the village to supply itself with water from a stream, but had made no provision for indemnifying the owners of lands through which the stream flowed for the injury they must suffer from the diversion of the water. The Constitution of New York at that time contained no provision prohibiting the taking of private property for public use without compensation; notwithstanding this, Chancellor Kent restrained the village from proceeding upon the broad general principle which he found in Magna Charta, in a statutory Bill of Rights, which of course could not control the legislature, and in Grotius, Puffendorf, and Bynkershoek. (I owe this reference to the kindness of Mr. Theodore Bacon.)

As the doctrine stated in the text has been doubted by some critics, I may now (Sept. 1892) refer for further confirmation of it to *Dash* v. *Van Kleech*, 7 Johns. 477 (words of Chancellor Kent), and *People* v. *Gillson*, 109 N. Y. 398.

never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it; and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto*, is true also as to any part of an act which is found to be unconstitutional, and which consequently is to be regarded as having never at any time been possessed of legal force."

CHAPTER XXXVII

THE DEVELOPMENT OF STATE CONSTITUTIONS

THREE periods may be distinguished in the development of State government as set forth in the constitutions, each period marked by an increase in the length and minuteness of those instruments.

The first period covers about thirty years from 1776 downwards, and includes the earlier constitutions of the original thirteen States, as well as of Kentucky, Vermont, Tennessee, and Ohio.

Most of these constitutions were framed under the impressions of the Revolutionary War. They manifest a dread of executive power and of military power, together with a disposition to leave everything to the legislature, as being the authority directly springing from the people. The election of a State governor is in most States vested in the legislature. He is nominally assisted, but in reality checked, by a council not of his own choosing. He has not (except in Massachusetts) a veto on the acts of the legislature.[1] He has not, like the royal governors of colonial days, the right of adjourning or dissolving it. The idea of giving power to the people directly has scarcely appeared, because the legislature is conceived as the natural and necessary organ of popular government, much as the House of Commons is in England. And hence many of these early constitutions consist of little beyond an elaborate Bill of Rights and a comparatively simple outline of a frame of government, establishing a representative legislature, with a few executive officers and courts of justice carefully separated therefrom.

The second period covers the first half of the present cen-

[1] In New York a veto on the acts of the legislature was by the first Constitution vested in the government and judges of the highest State court, acting together.

tury down to the time when the intensity of the party struggles over slavery (1850–60) interrupted to some extent the natural process of State development. It is a period of the democratization of all institutions, a democratization due not only to causes native to American soil, such as the supremacy in politics of the generation who had been boys during the Revolutionary War, but to the influence upon the generation which had then come to manhood of French republican ideas, an influence which declined after 1805 and ended with 1851, since which time French examples and ideas have counted for very little. Such provisions for the maintenance of religious institutions by the State as had continued to exist are now swept away. The principle becomes established (in the North and West) that constitutions must be directly enacted by popular vote. The choice of a governor is taken from the legislature, to be given to the people. Property qualifications are abolished, and a suffrage practically universal, except that it often excludes free persons of colour, is introduced. Even the judges are not spared. Many constitutions shorten their term, and direct them to be chosen by popular vote. The State has emerged from the English conception of a community acting through a ruling legislature, for the legislature begins to be regarded as being only a body of agents exercising delegated and restricted powers, and obliged to recur to the sovereign people (by asking for a constitutional amendment) when it seeks to extend these powers in any particular direction. The increasing length of the constitutions during this half century shows how the range of the popular vote has extended, for these documents now contain a mass of ordinary law on matters which in the early days would have been left to the legislatures.

In the third period, which begins from about the time of the Civil War, a slight reaction may be discerned, not against popular sovereignty, which is stronger than ever, but in the tendency to strengthen the executive and judicial departments. The governor had begun to receive in the second period, and has now in every State but four, a veto on the acts of the legislature. His tenure of office has been generally lengthened; the restrictions on his re-eligibility generally removed. In many States the judges have been granted larger salaries, and

their terms of office lengthened. Some constitutions have even transferred judicial appointments from the vote of the people to the executive. But the most notable change of all has been the narrowing of the competence of the legislature, and the fettering its action by complicated restrictions. It may seem that to take powers away from the legislature is to give them to the people, and therefore another step towards pure democracy. But in America this is not so, because a legislature always yields to any popular clamour, however transient, while direct legislation by the people involves delay. Such provisions are therefore conservative in their results, and are really checks imposed by the citizens upon themselves.

Taking the newer, and especially the Western and Southern Constitutions, and remembering that each is the work of an absolutely independent body, which (subject to the Federal Constitution) can organize its government and shape its law in any way it pleases, so as to suit its peculiar conditions and reflect the character of its population, one is surprised to find how similar these newer instruments are. There is endless variety in details, but a singular agreement in essentials. The influences at work, the tendencies which the constitutions of the last forty years reveal, are evidently the same over the whole Union. What are the chief of those tendencies? One is for the constitutions to grow longer. The new constitutions are longer, not only because new topics are taken up and dealt with, but because the old topics are handled in far greater detail. Such matters as education, ordinary private law, railroads, State and municipal indebtedness, were either untouched or lightly touched in the earlier instruments. The provisions regarding the judiciary and the legislature, particularly those restricting the power of the latter, have grown far more minute of late years, as abuses of power became more frequent, and the respect for legislative authority less. As the powers of a State legislature are *prima facie* unlimited, these bodies can be restrained only by enumerating the matters withdrawn from their competence, and the list grows always ampler. The time might almost seem to have come for prescribing that, like Congress, they should be entitled to legislate on certain enumerated subjects only, and be always required to establish affirmatively their competence to deal with any given topic.

I have already referred to the progress which the newer constitutions show towards more democratic arrangements. The suffrage is now in almost every State enjoyed by all adult males. Citizenship is quickly and easily accorded to immigrants. And, most significant of all, the superior judges, who were formerly named by the governor, or chosen by the legislature, and who held office during good behaviour, are now in most States elected by the people for fixed terms of years. I do not ignore the strongly marked democratic character of even the first set of constitutions, formed at and just after the Revolution; but that character manifested itself chiefly in negative provisions, *i.e.* in forbidding exercises of power by the executive, in securing full civil equality, and the primordial rights of the citizen. The new democratic spirit is positive as well as negative. It refers everything to the direct arbitrament of the people. It calls their will into constant activity, sometimes by the enactment of laws on various subjects in the constitution, sometimes by prescribing to the legislature the purposes which legislation is to aim at. Even the tendency to support the executive against the legislature is evidence not so much of respect for authority as of the confidence of the people that the executive will be the servant of popular opinion, prepared at its bidding to restrain that other servant — the legislature — who is less trusted, because harder to fix with responsibility for misdoing.

That there are strong conservative tendencies in the United States is a doctrine whose truth will be illustrated later on. Meanwhile it is worth while to ask how far the history of State constitutions confirms the current notion that democracies are fond of change. The answer is instructive, because it shows how flimsy are the generalizations which men often indulge in when discussing forms of government, as if all communities with similar forms of government behaved in the same way. All the States of the Union are democracies, and democracies of nearly the same type. Yet while some change their constitutions frequently, others scarcely change theirs at all. Let me recall the reader's mind to the distinction already drawn between the older or New England type and the newer type, which we find in the Southern as well as the Western States. It is among the latter that changes are frequent.

Of the causes of these differences I will now touch on two only. One is the attachment which in an old and historic, a civilized and well-educated community, binds the people to their accustomed usages and forms of government. It is the newer States, without a past to revere, with a population undisciplined or fluctuating, that are prone to change. In well-settled commonwealths the longer a constitution has stood untouched, the longer it is likely to stand, because the force of habit is on its side, because an intelligent people learns to value the stability of its institutions, and to love that which it is proud of having created.

The other cause is the difference between the swiftness with which economic and social changes move in different parts of the country. They are the most constant sources of political change, and find their natural expression in alterations of the constitution. Such changes have been least swift and least sudden in the New England and Middle States, though in some of the latter the growth of great cities, such as New York and Philadelphia, has induced them, and induced therewith a tendency to amend the constitutions so as to meet new conditions and check new evils. They have been most marked in regions where population and wealth have grown with unexampled speed, and in those where the extinction of slavery has changed the industrial basis of society. Here lies the explanation of the otherwise singular fact that several of the original States, such as Virginia and Georgia, have run through many constitutions. These whilom slave States have not only changed greatly but changed suddenly: society, as well as political life, was dislocated by the Civil War, and has had to make more than one effort to set itself right.

The constitutions witness to a singular distrust by the people of its own agents and officers, not only of the legislatures but also of local authorities, as well rural as urban, whose powers of borrowing or undertaking public works are strictly limited.

They witness also to a jealousy of the Federal government. By most constitutions a Federal official is made incapable, not only of State office, but of being a member of a State legislature. These prohibitions are almost the only references to the National government to be found in the State constitutions,

which so far as their terms go might belong to independent communities. They usually talk of corporations belonging to other States as "foreign," and sometimes try to impose special burdens on them.

They show a wholesome anxiety to protect and safeguard private property in every way. The people's consciousness of sovereignty has not used the opportunity which the enactment of a constitution gives to override private rights: there is rather a desire to secure such rights from any encroachment by the legislature: witness the frequent provisions against the taking of property without due compensation, and against the passing of private or personal statutes which could unfairly affect individuals. The only exceptions to this rule are to be found in the case of anything approaching a monopoly, and in the case of wealthy corporations.

The extension of the sphere of State interference, with the corresponding departure from the doctrine of *laissez faire*, is a question so large and so interesting as to require a chapter to itself later. Here it may suffice to remark, that some departments of governmental action, which on the continent of Europe have long been handled by the State, are in America still left to private enterprise. For instance, the States neither own nor manage railways, or telegraphs, or mines, or forests, and they sell their public lands instead of working them. There is, nevertheless, visible in recent constitutions a strong tendency to extend the scope of public administrative activity. Most of the newer instruments establish not only railroad commissions, intended to control the roads in the interest of the public, but also bureaux of agriculture, labour offices, mining commissioners, land registration offices, dairy commissioners, insurance commissioners, and agricultural or mining colleges. And a reference to the statutes passed within the last few years in the Western States will show that more is being done in this direction by the legislatures, as exponents of popular sentiment, than could be gathered from the older among the Western constitutions.

A spirit of humanity and tenderness for suffering, very characteristic of the American people, appears in the directions which many constitutions contain for the establishment of charitable and reformatory institutions, and for legislation to

protect children. Sometimes the legislature is enjoined to provide that the prisons are made comfortable; or directions are given that homes or farms be provided as asylums for the aged and unfortunate. On the other hand, this tenderness is qualified by the judicious severity which in most States debars persons convicted of crime from the electoral franchise. Lotteries are stringently prohibited by some of the recent constitutions.

In the older Northern constitutions, and in nearly all the more recent constitutions of all the States, ample provision is made for the creation and maintenance of schools. Even universities are the object of popular zeal, though a zeal not always according to knowledge. Most Western constitutions direct their establishment and support from public funds or land grants.

Although a constitution is the fundamental and supreme law of the State, one must not conclude that its provisions are any better observed and enforced than those of an ordinary statute. There is sometimes reason to suspect that when an offence is thought worthy of being specially mentioned in a constitution, this happens because it is specially frequent, and because men fear that the legislature may shrink from applying due severity to repress it, or the public prosecuting authorities may wink at it. Certain it is that in many instances the penalties threatened by constitutions fail to attain their object. For instance, the constitutions of most of the Southern States have for many years past declared duellists, and even persons who abet a duel by carrying a challenge, incapable of office, or of sitting in the legislature. Yet the practice of private warfare does not seem to have declined in Mississippi, Texas, or Arkansas, where these provisions exist.

CHAPTER XXXVIII

DIRECT LEGISLATION BY THE PEOPLE

In the United States the conception that the people (*i.e.* the citizens at large) are and ought of right to be the supreme legislators has taken the form of legislation by enacting or amending a constitution. Instead of, like the Swiss, submitting ordinary laws to the voters after they have passed the legislature, the Americans take subjects which belong to ordinary legislation out of the category of statutes, place them in the Constitution, and then handle them as parts of this fundamental instrument. They are not called laws; but laws they are to all intents and purposes, differing from statutes only in being enacted by an authority which is not a constant but an occasional body, called into action only when a convention or a legislature lays propositions before it.

This system sprang from the fact that the constitutions of the colonies having been given to them by an external authority superior to the colonial legislature, the people of each State, seeing that they could no longer obtain changes in their constitution from Britain, assumed to themselves the right and duty of remodelling it; putting the collective citizendom of the State into the place of the British Crown as sovereign. The business of creating or remodelling an independent commonwealth was to their thinking too great a matter to be left to the ordinary organs of State life. This feeling, which had begun to grow from 1776 onwards, was much strengthened by the manner in which the Federal Constitution was enacted in 1788 by State conventions. It seemed to have thus received a specially solemn ratification; and even the Federal legislature, which henceforth was the centre of National politics, was placed far beneath the document which expressed the will of the people as a whole.

As the Republic went on working out both in theory and in

practice those conceptions of democracy and popular sovereignty which had been only vaguely apprehended when enunciated at the Revolution, the faith of the average man in himself became stronger, his love of equality greater, his desire, not only to rule, but to rule directly in his own proper person, more constant. These sentiments would have told still further upon State governments had they not found large scope in local government. However, even in State affairs they made it an article of faith that no constitution could be enacted save by the direct vote of the citizens; and they inclined the citizens to seize such chances as occurred of making laws for themselves in their own way. Concurrently with the growth of these tendencies there had been a decline in the quality of the State legislatures, and of the legislation which they turned out. They were regarded with less respect; they inspired less confidence. Hence the people had the further excuse for superseding the legislature, that they might reasonably fear it would neglect or spoil the work they desired to see done. And instead of being stimulated by this distrust to mend their ways and recover their former powers, the State legislatures fell in with the tendency, and promoted their own supersession. The chief interest of their members, as will be explained later, is in the passing of special or local acts, not of general public legislation. They are extremely timid, easily swayed by any active section of opinion, and afraid to stir when placed between the opposite fires of two such sections. Hence they welcomed the direct intervention of the people as relieving them of embarrassing problems.

The methods by which legislative power is directly vested in the American voters are two. One is the enactment or amendment by them of a constitution.

The other method is the submission to popular vote, pursuant to the provisions of the Constitution, of a proposal or proposals therein specified. If such a proposal has been first passed by the legislature, we have here also an instance of a referendum in the Swiss sense.

The same principle of popular vote has been widely applied to local as well as to State government. Many recent constitutions provide that the approval of the people at the polls shall be needed in order to validate a decision of the city, or

county, or school district, or township authority regarding borrowing, or taxing, or lending public funds to some enterprise it may be desired to assist. Licensing questions are usually left to popular determination alone, with no interference by the local representative authority.

What are the practical advantages of this plan of direct legislation by the people? Its demerits are obvious. Besides those I have already stated, it tends to lower the authority and sense of responsibility in the legislature; and it refers matters needing much elucidation by debate to the determination of those who cannot, on account of their numbers, meet together for discussion, and many of whom may have never thought about the matter.

But the improvement of the legislatures is just what the Americans despair of, or, as they prefer to say, have not time to attend to. Hence they fall back on the direct popular vote as the best course available under the circumstances of the case, and in such a world as the present. They do not claim that it has any great educative effect on the people. But they remark with truth that the mass of the people are equal in intelligence and character to the average State legislator, and are exposed to fewer temptations. Nor should it be forgotten that in a country where law depends for its force on the consent of the governed, it is eminently desirable that law should not outrun popular sentiment, but have the whole weight of the people's deliverance behind it.[1]

If the practice of recasting or amending State constitutions were to grow common, one of the advantages of direct legislation by the people would disappear, for the sense of permanence would be gone, and the same mutability which is now possible in ordinary statutes would become possible in the provisions of the fundamental law. But this fault of small democracies, especially when ruled by primary assemblies, is unlikely to recur in large democracies, such as most States have now become, nor does it seem to be on the increase among

[1] In the case of local option there is the further argument that to commit the question of licences to a local representative is virtually to make the election of that authority turn upon this single question, and that there is an advantage in making a restriction on the freedom of the individual issue directly from the vote of the people, who may feel themselves doubly bound to enforce what they have directly enacted.

them. Reference to the people, therefore, acts as a conservative force; that is to say, it is a conservative method as compared with action by the legislature.

This method of legislation by means of a constitution or amendments thereto, arising from sentiments and under conditions in many respects similar to those which have produced the referendum in Switzerland, is an interesting illustration of the tendency of institutions, like streams, to wear their channels deeper. A historical accident, so to speak, suggested to the Americans the subjection of their legislatures to a fundamental law, and the invention has been used for other purposes far more extensively than its creators foresaw. It is now, moreover, serviceable in a way which those who first used it did not contemplate, though they are well pleased with the result. It acts as a restraint not only on the vices and follies of legislators, but on the people themselves. Having solemnly bound themselves by their constitution to certain rules and principles, the people come to respect those principles. They have parted with powers which they might be tempted in a moment of excitement, or under the pressure of suffering, to abuse through their too pliant representatives; and although they can resume these powers by enacting a new constitution or amending the old one, the process of resumption requires time, and involves steps which secure care and deliberation, while allowing passion to cool, and the prospect of a natural relief from economic evils to appear.

State constitutions, considered as laws drafted by a convention and enacted by the people at large, are better both in form and substance than laws made by the legislature, because they are the work of abler, or at any rate of honester, men, acting under a special commission which imposes special responsibilities on them. The appointment of a constitutional convention excites general interest in a State. Its functions are weighty, far transcending those of the regular legislature. Hence some of the best men in the State desire a seat in it, and, in particular, eminent lawyers become candidates, knowing how much it will affect the law they practise. It is therefore a body superior in composition to either the Senate or the House of a State. Its proceedings are followed with closer attention; and it is exempt from the temptations with which

the power of disposing of public funds bestrews the path of ordinary legislators; its debates are more instructive, its conclusions are more carefully weighed, because they cannot be readily reversed. Or if the work of altering the constitution is carried out by a series of amendments, these are likely to be more fully considered by the legislature than ordinary statutes would be, and to be framed with more regard to clearness and precision.

In the interval between the settlement by the convention of its draft constitution, or by the legislature of its draft amendments, and the putting of the matter to the vote of the people, there is copious discussion in the press and at public meetings, so that the citizens often go well prepared to the polls. An all-pervading press does the work which speeches did in the ancient republics, and the fact that constitutions and amendments so submitted are frequently rejected, shows that the people, whether they act wisely or not, do not at any rate surrender themselves blindly to the judgment of a convention, or obediently adopt the proposals of a legislature.

CHAPTER XXXIX

STATE GOVERNMENTS: THE LEGISLATURE

The similarity of the frame of government in the forty-five Republics which make up the United States, a similarity which appears the more remarkable when we remember that each of these republics is independent and self-determined as respects its frame of government, is due to the common source whence the governments flow. They are all copies, some immediate, some mediate, of ancient English institutions, viz. chartered self-governing corporations, which, under the influence of English habits, and with the precedent of the English parliamentary system before their eyes, developed into governments resembling that of England in the eighteenth century. Each of the thirteen colonies had up to 1776 been regulated by a charter from the British Crown, which, according to the best and oldest of all English traditions, allowed it the practical management of its own affairs. The charter contained a sort of skeleton constitution, which usage had clothed with nerves, muscles, and sinews, till it became a complete working system of free government. There was in each a governor, in two colonies chosen by the people, in the rest nominated by the Crown or the "proprietor;" there was a legislature; there were executive officers acting under the governor's commission and judges nominated by him; there were local self-governing communities.

When the thirteen colonies became sovereign States at the Revolution, they preserved this frame of government, substituting a governor chosen by the State for one appointed by the Crown. As the new States admitted to the Union after 1789 successively formed their constitutions prior to their admission to the Union, each adopted the same scheme, its people imitating, as was natural, the older commonwealths whence they came, and whose working they understood and admired. They were the more inclined to do so because they found in the older

constitutions that sharp separation of the executive, legislative, and judicial powers which the political philosophy of those days taught them to regard as essential to a free government, and they all take this separation as their point of departure.

I have observed in an earlier chapter that the influence on the framers of the Federal Constitution of the examples of free government which they found in their several States, had been profound. We may sketch out a sort of genealogy of governments as follows: —

First. The English incorporated company, a self-governing body, with its governor, deputy-governor, and assistants chosen by the freemen of the company, and meeting in what is called the general court or assembly.

Next. The colonial government, which out of this company evolves a governor or executive head and a legislature, consisting of representatives chosen by the citizens and meeting in one or two chambers.

Thirdly. The State government, which is nothing but the colonial government developed and somewhat democratized, with a governor chosen originally by the legislature, now always by the people at large, and now in all cases with a legislature of two chambers. From the original thirteen States this form has spread over the Union and prevails in every State.

Lastly. The Federal government, modelled after the State governments, with its President chosen, through electors, by the people, its two-chambered legislature, its judges named by the President.

Out of such small beginnings have great things grown.

It would be endless to describe the minor differences in the systems of the several States. I will sketch the outlines only, which, as already observed, are in the main the same everywhere.

Every State has —

1 An executive elective head, the governor.
A number of other administrative officers.
2 A legislature of two Houses.
3 A system of courts of justice.

Various subordinate local self-governing communities, counties, cities, townships, villages, school districts.

The governor and the other chief officials are not now chosen by the legislature, as was the case under most of the older State constitutions, but by the people. They are as far as possible disjoined from the legislature. Neither the governor nor any other State official can sit in a State legislature. He cannot lead it. It cannot, except of course by passing statutes, restrain him. There can therefore be no question of any government by ministers who link the executive to the legislature according to the system of the free countries of modern Europe and of the British colonies.

Of these several powers it is best to begin by describing the legislature, because it is by far the strongest and most prominent.

An American State legislature always consists of two Houses, the smaller called the Senate, the larger usually called the House of Representatives, though in six States it is entitled "The Assembly," and in three "The House of Delegates." The origin of this very interesting feature is to be sought rather in history than in theory. It is due partly to the fact that in some colonies there had existed a small governor's council in addition to the popular representative body, partly to a natural disposition to imitate the mother country with its Lords and Commons, a disposition which manifested itself both in colonial days and when the revolting States were giving themselves new constitutions, for up to 1776 some of the colonies had gone on with a legislature of one House only. Now, however, the need for two chambers is deemed an axiom of political science, being based on the belief that the innate tendency of an assembly to become hasty, tyrannical, and corrupt, needs to be checked by the co-existence of another house of equal authority. The Americans restrain their legislatures by dividing them, just as the Romans restrained their executive by substituting two consuls for one king. The only States that ever tried to do with a single House were Pennsylvania, Georgia, and Vermont, all of whom gave it up: the first after four years' experience, the second after twelve years, the last after fifty years.

Both Houses are chosen by popular vote, generally in equal

electoral districts, and by the same voters, although in a few States there are minor variations as to modes of choice. Illinois by her Constitution of 1870, and Michigan by a statute of 1889, create a system of proportional representation by means of the cumulative vote; *i.e.* the elector may cast as many votes for any one candidate as there are representatives to be elected in the district, or may distribute his votes among the candidates.

The following differences between the rules governing the two Houses are general: —

1. The senatorial electoral districts are always larger, usually twice or thrice as large as the House districts, and the number of senators is, of course, in the same proportion smaller than that of representatives.

2. A senator is usually chosen for a longer term than a representative. In twenty-eight States he sits for four years, in one (New Jersey) for three, in thirteen for two, in two (Massachusetts and Rhode Island) for one year only; the usual term of a representative being two years.

3. In most cases the Senate, instead of being elected all at once like the House, is only partially renewed, half its members going out when their two, or four, years have been completed, and a new half coming in. This gives it a sense of continuity which the House wants.

4. In some States the age at which a man is eligible for the Senate is fixed higher than that for the House of Representatives; and in one (Delaware) he must own freehold land of 200 acres or real or personal estate of the value of £1000 (Constitution of 1792, repeated in Constitution of 1831). Other restrictions on eligibility, such as the exclusion of clergymen (which still exists in six States, and is of old standing), that of salaried public officials (which exists everywhere), that of United States officials and members of Congress, and that of persons not resident in the electoral district (frequent by law and practically universal by custom), apply to both Houses. In some States this last restriction goes so far that a member ceasing to reside in the district for which he was elected loses his seat *ipso facto*.

Nobody dreams of offering himself as a candidate for a place in which he does not reside, even in new States, where it might

be thought that there had not been time for local feeling to spring up. Hence the educated and leisured residents of the greater cities have no chance of entering the State legislature except for the city district wherein they dwell; and as these city districts are those most likely to be in the hands of some noxious and selfish ring of professional politicians, the prospect for such an aspirant is a dark one. Nothing more contributes to make reform difficult than the inveterate habit of choosing residents only as members. Suppose an able and public-spirited man desiring to enter the Assembly or the Senate of his State and shame the offenders who are degrading or plundering it. He may be wholly unable to find a seat, because in his place of residence the party opposed to his own may hold a permanent majority, and he will not be even considered elsewhere. Suppose a group of earnest men who, knowing how little one man can effect, desire to enter the legislature at the same time and work together. Such a group can hardly arise except in or near a great city. It cannot effect an entrance, because the city has at best very few seats to be seized, and the city men cannot offer themselves in any other part of the State. That the restriction often rests on custom, not on law, makes the case more serious. A law can be repealed, but custom has to be unlearned; the one may be done in a moment of happy impulse, the other needs the teaching of long experience applied to receptive minds.

The fact is, that the Americans have ignored in all their legislative, as in many of their administrative arrangements, the differences of capacity between man and man. They underrate the difficulties of government and overrate the capacities of the man of common sense. Great are the blessings of equality; but what follies are committed in its name!

The unfortunate results of this local sentiment have been aggravated by the tendency to narrow the election areas, allotting one senator or representative to each district. Under the older Constitution of Connecticut, for instance, the twelve senators were elected out of the whole State by a popular vote. Now (amendments of A.D. 1828) the twenty-four senators are chosen by districts, and the Senate is to-day an inferior body, because then the best men of the whole State might be chosen, now it is possible only to get the leading men of the

districts. In Massachusetts, under the Constitution of 1780, the senators were chosen by districts, but a district might return as many as six senators: the assemblymen were chosen by towns,[1] each corporate town having at least one representative, and more in proportion to its population, the proportion being at the rate of one additional member for every 275 ratable polls. In 1836 the scale of population to representatives was raised, and a plan prescribed (too complicated to be here set forth) under which towns below the population entitling them to one representative should have a representative during a certain number of years out of every ten years, the census being taken decennially. Thus a small town might send a member to the Assembly for five years out of every ten, choosing alternate years, or the first five, or the last five, as it pleased. Now, however (amendments of A.D. 1857), the State has been divided into forty senatorial districts, each of which returns one senator only, and into 175 Assembly districts, returning, one, two, or, in a few cases, three representatives each. The composition of the legislature has declined ever since this change was made. The area of choice being smaller, inferior men are chosen; and in the case of the Assembly districts which return one member, but are composed of several small towns, the practice has grown up of giving each town its turn, so that not even the leading man of the district, but the leading man of the particular small community whose turn has come round, is chosen to sit in the Assembly.

Universal manhood suffrage, subject to certain disqualifications in respect of crime (including bribery and polygamy) and of the receipt of poor law relief, which prevail in many States — in eight States no pauper can vote — is the rule in nearly all the States. Some of the States give the suffrage to women. A property qualification was formerly required in many, and lasted till 1888 in Rhode Island. Other States require the voter to have paid some State or county tax; but if he does not pay it, his party usually pay it for him, so the restriction is of little practical importance. Massachusetts also requires that he shall be able to read the State Constitution in

[1] A town or township means in New England, and indeed generally in the United States, a small rural district, as opposed to a city. It is a community which has not received representative municipal government.

English, and to write his name (amendments of 1857), Connecticut, that he shall be able to read any section of the Constitution or of the statutes, and shall sustain a good moral character (amendments of 1855 and 1845). This educational test is of no great consequence, partly, no doubt, because illiteracy is not high in either State; and under the new ballot laws it will scarcely be needed. Mississippi prescribes that the person applying to be registered "shall be able to read any section of the Constitution or be able to understand the same when read to him or give a reasonable interpretation thereof" (Constitution of 1890).[1] Certain terms of residence within the United States, in the particular State, and in the voting districts, are also required: these vary greatly from State to State, but are usually short.

The suffrage is generally the same for other purposes as for that of elections to the legislature, and is in most States confined to male inhabitants. In a few States women are permitted to vote at school district and in one (Kansas) at municipal elections,[2] and in these no disability has been imposed upon married women; nor has it been attempted, in the various constitutional amendments framed to give political suffrage to women, to draw such a distinction, which would indeed be abhorrent to the genius of American law.

It is important to remember that, by the Constitution of the United States, the right of suffrage in Federal or National elections (*i.e.* for presidential electors and members of Congress) is in each State that which the State confers on those who vote at the election of its more numerous House. That the differences, which might exist between one State and another in the width of the Federal franchise thus granted, are at present insignifi-

[1] The reasonable interpretation of this remarkable provision seems to be that it is intended to furnish a peaceful method of excluding illiterate negroes and including illiterate whites: a result which has been in fact attained, and which, though it may appear at variance with the spirit of the fifteenth amendment to the Federal Constitution, is under the circumstances of Mississippi possibly not the worst solution of a difficult problem.

[2] Minnesota and Colorado, as well as the Dakotas and Montana, give the school vote to women by their constitutions; Massachusetts has granted it by statute; Washington permits the legislature to grant it; Idaho grants it provisionally, permitting the legislature to withdraw it. Montana confers what may be called the tax-payers' *referendum* or direct popular vote on women possessing the like qualifications with men (Art. ix. § 12).

cant is due, partly to the prevalence of democratic theories of equality over the whole Union, partly to the provision of the fourteenth amendment to the Federal Constitution, which reduces the representation of a State in the Federal House of Representatives, and therewith also its weight in a presidential election, in proportion to the number of adult male citizens disqualified in that State. As a State desires to have its full weight in National politics, it has a strong motive for the widest possible enlargement of its Federal franchise, and this implies a corresponding width in its domestic franchise.

The number of members of the legislature varies greatly from State to State. Delaware, with nine senators, has the smallest Senate, Illinois, with fifty-one, the largest. Delaware has also the smallest House of Representatives, consisting of twenty-one members; while New Hampshire, a very small State, has the largest with 321. The New York Houses number 32 and 128 respectively, those of Pennsylvania 50 and 201, those of Massachusetts 40 and 240. In the Western and Southern States the number of representatives rarely exceeds 120.

As there is a reason for everything in the world, if one could but find it out, so for this difference between the old New England States and those newer States which in many other points have followed their precedents. In the New England States local feeling was and is intensely strong, and every little town wanted to have its member. In the West and South, local divisions have had less natural life; in fact, they are artificial divisions rather than genuine communities that arose spontaneously. Hence the same reason did not exist in the West and South for having a large Assembly; while the distrust of representatives, the desire to have as few of them as possible and pay them as little as possible, have been specially strong motives in the West and South, as also in New York and Pennsylvania, and have caused a restriction of numbers.

In all States the members of both Houses receive the same salary. In some cases it is fixed at an annual sum of from $150 (Maine) to $1500 (New York), the average being $500. More frequently, however, it is calculated at so much for every day during which the session lasts, varying from $1 (in Rhode Island) to $8 (in California and Nevada) per day ($5 seems to be the average), besides a small allowance, called mileage, for

travelling expenses. The States which pay by the day are also those which limit the session. Some States secure themselves against prolonged sessions by providing that the daily pay shall diminish, or shall absolutely cease and determine, at the expiry of a certain number of days, hoping thereby to expedite business and check inordinate zeal for legislation.

It was formerly usual for the legislature to meet annually, but the experience of bad legislation and over-legislation has led to fewer as well as shorter sittings; and sessions are now biennial in all States but the five following: — Massachusetts, Rhode Island, New York, New Jersey, South Carolina, all of them old States. In these the sessions are annual, save in that odd little nook Rhode Island, which still convokes her legislature every May at Newport, and afterwards holds an adjourned session at Providence, the other chief city of the commonwealth. There is, however, in nearly all States a power reserved to the governor to summon the Houses in extraordinary session should a pressing occasion arise.

Bills may originate in either House, save that in twenty-one States money bills must originate in the House of Representatives, a rule for which, in the present condition of things, when both Houses are equally directly representative of the people and chosen by the same electors, no sufficient ground appears. It is a curious instance of the wish which animated the framers of the first constitutions of the original thirteen States to reproduce those details of the English Constitution which had been deemed bulwarks of liberty. The newer States borrowed it from their elder sisters, and the existence of a similar provision in the Federal Constitution has helped to perpetuate it in all the States. But there is a reason for it in Congress, the Federal Senate not being directly representative of equal numbers of citizens, which is not found in the State legislatures; it is in these last a mere survival of no present functional value. Money bills may, however, be amended or rejected by the State Senates like any other bills, just as the Federal Senate amends money bills brought up from the House.

In one point a State Senate enjoys a special power, obviously modelled on that of the English House of Lords and the Federal Senate. It sits as a court under oath for the trial of State

officials impeached by the House.[1] Like the Federal Senate, it has in many States the power of confirming or rejecting appointments to office made by the governor. When it considers these it is said to "go into executive session." The power is an important one in those States which allow the governor to nominate the higher judges. In other respects, the powers and procedure of the two Houses of a State legislature are identical; except that, whereas the lieutenant-governor of a State is generally *ex officio* president of the Senate, with a casting vote therein, the House always chooses its own Speaker. The legal quorum is usually fixed, by the constitution, at a majority of the whole number of members elected, though a smaller number may adjourn and compel the attendance of absent members. Both Houses do most of their work by committees, much after the fashion of Congress, and the committees are in both usually chosen by the Speaker (in the Senate by the President of that body), though it is often provided that the House (or Senate) may on motion vary their composition. Both Houses sit with open doors, but in most States the constitution empowers them to exclude strangers when the business requires secrecy.

The State governor has of course no right to dissolve the legislature, nor even to adjourn it unless the Houses, while agreeing to adjourn, disagree as to the date. Such control as the legislature can exercise over the State officers by way of inquiry into their conduct is generally exercised by committees, and it is in committees that the form of bills is usually settled and their fate decided, just as in the Federal Congress, the lobby having of course a great and usually a pernicious influence. The proceedings are rarely reported. Sometimes when a committee takes evidence on an important question reporters are present, and the proceedings more resemble a public meeting than a legislative session. It need scarcely be added that neither House separately, nor both Houses acting together, can control an executive officer otherwise than either by passing a statute prescribing a certain course of action for him, which if it be in excess of their powers will be held unconstitutional and void, or by withholding the

[1] In New York impeachments are tried by the Senate and the judges of the Court of Appeals sitting together: in Nebraska by the judges of the Supreme Court.

appropriations necessary to enable him to carry out the course of action he proposes to adopt. The latter method, where applicable, is the more effective, because it can be used by a bare majority of either House, whereas a bill passed by both Houses may be vetoed by the governor, a point so important as to need a few words.

Four States, three of them original States, vest legislative authority in the legislature alone. These are Rhode Island, Delaware, North Carolina, and Ohio. All the rest require a bill to be submitted to the governor, and permit him to return it to the legislature with his objections. If he so returns it, it can only be again passed "over the veto" by something more than a bare majority. To so pass a bill over the veto there is required —

In two States a majority of three-fifths in each House.
In twenty-seven States a majority of two-thirds in each House.
In nine States a majority in each House of all the members elected to that House.
In two States (North Dakota and Wyoming) a majority of two-thirds of all the members elected.

Here, therefore, as in the Federal Constitution, we find a useful safeguard against the unwisdom or misconduct of a legislature, and a method provided for escaping, in extreme cases, from those deadlocks which the system of checks and balances tends to occasion.

I have adverted in a preceding chapter to the restrictions imposed on the legislatures of the States by their respective constitutions. These restrictions, which are numerous, elaborate, and instructive, take two forms —

I. Exclusions of a subject from legislative competence, *i.e.* prohibitions to the legislature to pass any law on certain enumerated subjects. The most important classes of prohibited statutes are —

Statutes inconsistent with democratic principles, as, for example, granting titles of nobility, favouring one religious denomination, creating a property qualification for suffrage or office.

Statutes against public policy, *e.g.* tolerating lotteries, impairing the obligation of contracts, incorporating or permitting the incorporation of banks, or the holding by a State of bank stock.

Statutes special or local in their application, a very large and increasing category, the fulness and minuteness of which in many constitutions show that the mischiefs arising from improvident or corrupt special legislation must have become alarming.

Statutes increasing the State debt beyond a certain limited amount, or permitting a local authority to increase its debt beyond a prescribed amount, the amount being usually fixed in proportion to the valuation of taxable property within the area administered by the local authority.

II. Restrictions on the procedure of the legislature, *i.e.* directions as to the particular forms to be observed and times to be allowed in passing bills, sometimes all bills, sometimes bills of a certain specified nature. Among these restrictions will be found provisions —

As to the majorities necessary to pass certain bills, especially appropriation bills. Sometimes a majority of the whole number of members elected to each House is required, or a majority exceeding a bare majority.

As to the method of taking the votes, *e.g.* by calling over the roll and recording the vote of each member.

As to allowing certain intervals to elapse between each reading of a measure, and for preventing the hurried passage of bills, especially appropriation bills, at the end of the session.

As to the reading of bills publicly and at full length.

As to sending all bills to a committee, and prescribing the mode of its action.

Against secret sessions (Idaho).

As to preventing an act from taking effect until a certain time, *e.g.* ninety days (South Dakota, Kentucky), after the adjournment of the session.

Against changing the purpose of a bill during its passage.

As to including in a bill only one subject, and expressing that subject in the title of the bill.

Against re-enacting, or amending, or incorporating, any former act by reference to its title merely, without setting out its contents.

The two latter classes of provisions might be found wholesome in England, where much of the difficulty complained of by the judges in construing the law arises from the modern habit of incorporating parts of former statutes, and dealing with them by reference.

Where statutes have been passed by a legislature upon a prohibited subject, or where the prescribed forms have been transgressed or omitted, the statute will be held void so far as inconsistent with the Constitution.

Although State legislatures have of course no concern whatever with foreign affairs, this is not deemed a reason for abstaining from passing resolutions on that subject. The passion for what is called "resoluting" is strong everywhere in America, and an expression of sympathy with an oppressed foreign nationality, or of displeasure at any unfriendly behaviour of a foreign power, is not only an obvious way of relieving the feelings of the legislators, but often an electioneering device, which appeals to some section of the State voters. Accordingly such resolutions are common, and, though of course quite irregular, quite innocuous.

Debates in these bodies are seldom well reported, and sometimes not reported at all. One result is that the conduct of members escapes the scrutiny of their constituents; a better one that speeches are generally short and practical, the motive for rhetorical displays being absent. If a man does not make a reputation for oratory, he may for quick good sense and business habits. However, so much of the real work is done in committees that talent for intrigue or "management" usually counts for more than debating power.

CHAPTER XL

THE STATE EXECUTIVE

The executive department in a State consists of a governor (in all the States), a lieutenant-governor (in thirty-two), and of various minor officials. The governor, who under the earlier constitutions of most of the original thirteen States was chosen by the legislature, is now always elected by the people, and by the same suffrage, practically universal, as the legislature. He is elected directly, not, as under the Federal Constitution, by a college of electors. His term of office is, in nineteen States, four years; in two States, three years; in twenty-one States, two years; and in two States (Massachusetts and Rhode Island), one year. His salary varies from $10,000 in New York and Pennsylvania to $1000 in Michigan. Some States limit his re-eligibility.

The earlier constitutions of the original States (except South Carolina) associated with the governor an executive council (called in Delaware the Privy Council), but these councils have long since disappeared, except in Massachusetts, Maine, and North Carolina, and the governor remains in solitary glory the official head and representative of the majesty of the State. His powers are, however, in ordinary times more specious than solid, and only one of them is of great practical value. He is charged with the duty of seeing that the laws of the State are faithfully administered by all officials and the judgments of the courts carried out. He has, in nearly all States, the power of reprieving and pardoning offenders, but in some this does not extend to treason or to conviction on impeachment (in Vermont he cannot pardon for murder), and in some, other authorities are associated with him in the exercise of this prerogative. Some recent constitutions impose restrictions which witness to a distrust of his action; nor can it be denied that the power has sometimes

been used to release offenders (*e.g.* against the election laws) who deserved no sympathy. The governor is also commander-in-chief of the armed forces of the State, can embody the militia, repel invasion, suppress insurrection. The militia are now important chiefly as the force which may be used to suppress riots, latterly not unfrequent in connection with labor disputes. Massachusetts has also created a small State police force (called the district police), placing it at the disposal of the governor for the maintenance of order, wherever disturbed, and for the enforcement of various administrative regulations. It has recently been proposed to establish a State police in Pennsylvania for the same purposes. Michigan has (and Massachusetts and Rhode Island formerly had) a State police for the enforcement of their anti-liquor legislation.

The governor appoints some few officials, but seldom to high posts, and in many States his nominations require the approval of the State Senate. Patronage, in which the President of the United States finds one of his most desired and most disagreeable functions, is in the case of a State governor of slight value, because the State offices are not numerous, and the more important and lucrative ones are filled by the direct election of the people. He has the right of requiring information from the executive officials, and is usually bound to communicate to the legislature his views regarding the condition of the commonwealth. He may also recommend measures to them, but does not frame and present bills. In a few States he is directed to present estimates. He has in all the States but four a veto upon bills passed by the legislature. This veto may be overridden in manner already indicated (see last preceding chapter), but generally kills the measure, because if the bill is a bad one, it calls the attention of the people to the fact and frightens the legislature, whereas if the bill be an unobjectionable one, the governor's motive for vetoing it is probably a party motive, and the requisite overriding majority can seldom be secured in favour of a bill which either party dislikes. The use of his veto is, in ordinary times, a governor's most serious duty, and chiefly by his discharge of it is he judged.

Although much less sought after and prized than in "the days of the Fathers," when a State governor sometimes refused

to yield precedence to the President of the United States, the governorship is still, particularly in New England and the greater States, a post of some dignity, and affords an opportunity for the display of character and talents. During the Civil War, when each governor was responsible for enrolling, equipping, officering, and sending forward troops from his State,[1] and when it rested with him to repress attempts at disorder, much depended on his energy, popularity, and loyalty. In some States men still talk of the "war governors" of those days as heroes to whom the North owed deep gratitude. And since the Pennsylvanian riots of 1877 and those which have subsequently occurred in Cincinnati and Chicago have shown that tumults may suddenly grow to serious proportions, it has in many States become important to have a man of prompt decision and fearlessness in the office which issues orders to the State militia.

The elective lieutenant-governor, who, in most States, steps into the governor's place if it becomes vacant, is usually also *ex officio* President of the Senate, as the Vice-President of the United States is of the Federal Senate. Otherwise he is an insignificant personage, though sometimes a member of some of the executive boards.

The names and duties of the other officers vary from State to State. The most frequent are a secretary of state (in all States), a treasurer (in all), an attorney-general, a comptroller, an auditor, a superintendent of public instruction. Now and then we find a State engineer, a surveyor, a superintendent of prisons. Some States have also various boards of commissioners, *e.g.* for railroads, for canals, for prisons, for the land office, for agriculture, for labour, for immigration. Most of these officials are in nearly all States elected by the people at the general State election. Sometimes, however, they, or some of them, are either chosen by the legislature, or more rarely, appointed by the governor, whose nomination usually requires the confirmation of the Senate. Their salaries, which of course vary with the importance of the office and the parsimony of

[1] Commissions to officers up to the rank of colonel inclusive were usually issued by the governor of the State: the regiment, in fact, was a State product, though the regular Federal army is of course raised and managed by the Federal government directly.

the State, seldom exceed $5000 per annum and are usually smaller. So, too, the length of the term of office varies. It is often the same as that of the governor, and never exceeds four years, except that in New Jersey, a conservative State, the secretary and attorney-general hold for five years; and in Tennessee the attorney-general, who, oddly enough, is appointed by the Supreme Court of the State, holds for eight.

It has already been observed that the State officials are in no sense a ministry or cabinet to the governor. Holding independently of him, and responsible neither to him nor to the legislature, but to the people, they do not take generally his orders, and need not regard his advice. Each has his own department to administer, and as there is little or nothing political in the work, a general agreement in policy, such as must exist between the Federal President and his ministers, is not required. Policy rests with the legislature, whose statutes, prescribing minutely the action to be taken by the officials, leave little room for executive discretion.

Of the subordinate civil service of a State there is little to be said. Though it is not large, for the sphere of administrative action which remains to the State between the Federal government on the one side, and the county, city, and township governments on the other, is not wide, it increases daily, owing to the eagerness of the people (especially in the West) to have State aid rendered to farmers, to miners, to stock-keepers, and generally in the material development of the country. Much is now done in the way of collecting statistics and issuing reports. However, these administrative bureaux are seldom well manned, for the State legislatures are parsimonious, and do little, by good salaries or otherwise, to induce able men to enter it: while the so-called "Spoils System," which has been hitherto applied to State no less than Federal offices, too often makes places the reward of electioneering and wirepulling. Efforts are now being made in some States to induce reforms similar to those begun in the Federal administration, whereby certain walks of the civil service shall be kept out of politics, at least so far as to secure competent men against dismissal on party grounds. Such reforms would in no case apply to the higher officials chosen by the people, for they are always elected for short terms and on party lines.

Every State, except Oregon, provides for the impeachment of executive officers for grave offences. In all save two the State House of Representatives is the impeaching body; and in all but Nebraska the State Senate sits as the tribunal, a two-thirds majority being generally required for a conviction. Impeachments are rare in practice.

There is also in many States a power of removing officials, sometimes by the vote of the legislature, sometimes by the governor on the address of both Houses, or by the governor either alone or with the concurrence of the Senate. Such removals must of course be made in respect of some offence, or for some other sufficient cause, not from caprice or party motives; and when the case does not seem to justify immediate removal, the governor is frequently empowered to suspend the officer, pending an investigation of his conduct.

CHAPTER XLI

THE STATE JUDICIARY

The judiciary in every State includes three sets of courts: — A Supreme Court or Court of Appeal; superior courts of record; local courts; but the particular names and relations of these several tribunals and the arrangements for criminal business vary greatly from State to State. As respects the distinction which Englishmen used to deem fundamental, that of courts of common law and courts of equity, there has been great diversity of practice. Most of the original thirteen colonies once possessed separate courts of chancery, and these were maintained for many years after the separation from England, and were imitated in a few of the earlier among the new States, such as Michigan, Arkansas, Missouri. In some of the old States, however, the hostility to equity jurisdiction, which marked the popular party in England in the seventeenth century, had transmitted itself to America. Chancery courts were regarded with suspicion, because thought to be less bound by fixed rules, and therefore more liable to be abused by an ambitious or capricious judiciary. Massachusetts, for instance, would permit no such court, though she was eventually obliged to invest her ordinary judges with equitable powers, and to engraft a system of equity on her common law, while still keeping the two systems distinct. Pennsylvania held out still longer, but she also now administers equity, as indeed every civilized State must do in substance, dispensing it, however, through the same judges as those who apply the common law, and having more or less worked it into the texture of the older system. Special chancery courts were abolished in New York, where they had flourished and enriched American jurisprudence by many admirable judgments, by the democratizing Constitution of 1846; and they now exist only in a few of the States, chiefly older Eastern or Southern States, which, in judicial matters, have shown them-

selves more conservative than their sisters in the West. In four States only (New York, North Carolina, California, and Idaho) has there been a complete fusion of law and equity, although there are several others which have provided that the legislature shall abolish the distinction between the two kinds of procedure. Many, especially of the newer States, provide for the establishment of tribunals of arbitration and conciliation.

The jurisdiction of the State courts, both civil and criminal, is absolutely unlimited, *i.e.* there is no appeal from them to the Federal courts, except in certain cases specified by the Federal Constitution, being cases in which some point of Federal law arises. Certain classes of cases are, of course, reserved for the Federal courts and in some the State courts enjoy a concurrent jurisdiction. All crimes, except such as are punishable under some Federal statute, are justiciable by a State court; and it is worth remembering that in most States there exist much wider facilities for setting aside the verdict of a jury finding a prisoner guilty, by raising all sorts of points of law, than are permitted by the law and practice of England, or indeed of any European country. Such facilities have been and are abused, to the great detriment of the community.

One or two other points relating to law and justice in the States require notice. Each State recognizes the judgments of the courts of a sister State, gives credit to its public acts and records, and delivers up to its justice any fugitive from its jurisdiction, permitting him, moreover, to be (if necessary) tried for some other offence than that in respect of which his extradition was obtained. Of course the courts of one State are not bound either by law or usage to follow the reported decisions of those of another State. They use such decisions merely for their own enlightenment, and as some evidence of the common law, just as they use the English law reports.

Most of the States have within the last half century made sweeping changes, not only in their judicial system, but in the form of their law. They have revised and codified their statutes, a corrected edition whereof is issued every few years. They have in many instances adopted codes of procedure, and in some cases have even enacted codes embodying the substance of the common law, and fusing it with the statutes.

Such codes, however, have been condemned by the judgment of the abler and more learned part of the profession, as rendering the law more uncertain and less scientific. But with the masses of the people the proposal is popular, for it holds out a prospect, unfortunately belied by the result in States which, like California, have tried the experiment, of a system whose simplicity will enable the layman to understand the law, and render justice cheaper and more speedy. A really good code might have these happy effects. But it may be doubted whether the codifying States have taken the steps requisite to secure the goodness of the codes they enact.

Important as are the functions of the American judiciary, the powers of a judge are limited by the State constitutions in a manner surprising to Europeans. He is not generally allowed to charge the jury on questions of fact, but only to state the law. He is sometimes required to put his charge in writing. His power of committing for contempt of court is often restricted. Express rules forbid him to sit in causes wherein he can have any family or pecuniary interest.

I come now to three points, which are not only important in themselves, but instructive as illustrating the currents of opinion which have influenced the peoples of the States. These are —

The method of appointing the judges.
Their tenure of office.
Their salaries.

The remarkable changes that have been made in the two former matters, and the strange practice which now prevails in the latter, are full of significance for the student of modern democracy, full of warning for Europe and the British colonies.

In colonial days the superior judges were appointed by the governors, except in Rhode Island and Connecticut, where the legislature elected them. When, in and after 1776, the States formed their first constitutions, four States,[1] besides the two just named, vested the appointment in the legislature, five[2] gave it to the governor with the consent of the council; Delaware gave it to the legislature and president (= governor) in

[1] Virginia, New Jersey, North Carolina, and South Carolina.
[2] Massachusetts, New Hampshire, Pennsylvania, Maryland, New York.

joint ballot, while Georgia alone entrusted the election to the people.

In the period between 1812 and 1860, when the tide of democracy was running strong, the function was in several of the older States taken from the governor or the legislature to be given to the people voting at the polls; and the same became the practice among the new States as they were successively admitted to the Union. Mississippi, in 1832, made all her judges elected by the people. The decisive nature of the change was marked by the great State of New York, which, in her highly democratic Constitution of 1846, transferred all judicial appointments to the citizens at the polls.

At present we find that in thirty-one States the judges are elected by the people. These include nearly all the Western and South-western States, besides New York, Pennsylvania, and Ohio.

In five States [1] they are elected by the legislature.

In eight States [2] they are appointed by the governor, subject however to confirmation either by the council, or by the legislature, or by one House thereof.

It will be observed that nearly all the thirteen States which do not appoint the judge by popular election either belong to the original thirteen colonies or are States which have been specially influenced by one of those thirteen (as, for instance, Maine was influenced by Massachusetts). It is these older commonwealths that have clung to the less democratic methods of choosing judicial officers; while the new democracies of the West, together with the most populous States of the East, New York and Pennsylvania, States thoroughly democratized by their great cities, have thrown this grave and delicate function into the hands of the masses, that is to say, of the wire-pullers.

Originally, the superior judges were, in most States, like those of England since the Revolution of 1688, appointed for life, and held office during good behaviour, *i.e.* were removable only when condemned on an impeachment, or when an address

[1] Rhode Island, Vermont, Virginia, South Carolina, Georgia.

[2] Massachusetts, Connecticut, New Hampshire, Delaware, Maine, Mississippi, New Jersey, Louisiana; in the last of which, however, district judges, and in Maine and Connecticut probate judges, are popularly elected.

requesting their removal had been presented by both Houses of the legislature.[1] A judge may be removed upon such an address in thirty-six States, a majority of two-thirds in each House being usually required. The salutary provision of the British Constitution against capricious removals has been faithfully adhered to. But the wave of democracy has in nearly all States swept away the old system of life-tenure. Only four now retain it.[2] In the rest a judge is elected or appointed for a term, varying from two years in Vermont to twenty-one years in Pennsylvania. Eight to ten years is the average term prescribed; but a judge is always re-eligible, and likely to be re-elected if he be not too old, if he has given satisfaction to the bar, and if he has not offended the party which placed him on the bench.

The salaries paid to State judges of the higher courts range from $8500 (chief justice) in Pennsylvania and $10,000 in New York, to $2000 in Oregon and $2500 in Vermont. $4000 to $5000 (+ $500 to the chief judge) is the average, a sum which, especially in the greater States, fails to attract the best legal talent. To the rule that justices of the inferior courts receive salaries proportionately lower, there are exceptions in large cities, where judges of lower tribunals, being more "in politics," can sometimes secure salaries quite out of proportion to their status.[3]

Any one of the three phenomena I have described — popular elections, short terms, and small salaries — would be sufficient to lower the character of the judiciary. Popular elections throw the choice into the hands of political parties, that is to say, of knots of wirepullers inclined to use every office as a means of rewarding political services, and garrisoning with grateful partisans posts which may conceivably become of political importance. Short terms, though they afford useful opportunities of getting rid of a man who has proved a

[1] The power of impeachment remains but is not often used.

[2] Massachusetts, Rhode Island, New Hampshire, Delaware, all of them among the original thirteen. In Rhode Island the judges are in theory dismissible by the legislature. In Florida, though the three justices of the Supreme Court are now (Constitution of 1886) elected by the people, the seven circuit judges are appointed by the governor.

[3] *E.g.* the police justices of New York City and the circuit judges of Wayne County, Michigan, in which Detroit stands.

failure, but done no act justifying an address for his removal, oblige the judge to remember and keep on good terms with those who have made him what he is, and in whose hands his fortunes lie. They induce timidity, they discourage independence. And small salaries prevent able men from offering themselves for places whose income is perhaps only one-tenth of what a leading attorney can make by private practice. Putting the three sources of mischief together, no one will be surprised to hear that in many of the American States the State judges are men of moderate abilities and scanty learning, inferior, and sometimes vastly inferior, to the best of the advocates who practise before them. It is less easy to express a general opinion as to their character, and particularly as to what is called, even in America where fur capes are not worn, the "purity of the judicial ermine." Pecuniary corruption seems, so far as a stranger can ascertain, to be rare, perhaps very rare, but there are other ways in which sinister influences can play on a judge's mind, and impair that confidence in his impartiality which is almost as necessary as impartiality itself. And apart from all questions of dishonesty or unfairness, it is an evil that the bench should not be intellectually and socially at least on a level with the bar.

The mischief is serious. But I must own that it is smaller than a European observer is prepared to expect. In most of the States where the elective system prevails the bench is respectable; and in some it is occasionally adorned by men of the highest eminence. Michigan, for instance, has during many years had a strong and respected judiciary. One of its recent judges sat for thirty-two years, having been re-elected six times in succession. Not even in California or Arkansas are the results so lamentable as might have been predicted. New York City, under the dominion of the Tweed Ring, has afforded the only instance of flagrant judicial scandals; and even in those loathsome days, the Court of Appeals at Albany, the highest tribunal of the State, retained the respect of good citizens. Justice in civil causes between man and man is fairly administered over the whole Union, and the frequent failures to convict criminals, or punish them when convicted, are attributable not so much either to weakness or to partiality on a judge's part as to the tender-

ness of juries and the inordinate delays and complexity of criminal procedure.

Why then have sources of evil so grave failed to produce correspondingly grave results? Three reasons may be suggested: —

One is the co-existence in every State of the Federal tribunals, presided over by judges who are usually capable and always upright. Their presence helps to keep the State judges, however personally inferior, from losing the sense of responsibility and dignity which befits the judicial office, and makes even party wirepullers ashamed of nominating as candidates men either tainted or notoriously incapable.

Another is the influence of a public opinion which not only recognizes the interest the community has in an honest administration of the law, but recoils from turpitude in a highly placed official. The people act as a check upon the party conventions that choose candidates, by making them feel that they damage themselves and their cause if they run a man of doubtful character, and the judge himself is made to dread public opinion in the criticisms of a very unreticent press. Democratic theory, which has done a mischief in introducing the elective system, partly cures it by subjecting the bench to a light of publicity which makes honesty the safest policy. Whatever passes in court is, or may be, reported. The judge must give his reasons for every judgment he delivers.

Lastly, there is the influence of the bar, a potent influence even in the present day, when its *rôle* is less brilliant than in former generations. The local party leaders who select the candidates and "run" the conventions are in some States mostly lawyers themselves, or at least in close relations with some leading lawyers of the State or district. Now lawyers have not only a professional dislike to the entrusting of law to incapable hands, the kind of dislike which a skilled bricklayer has to seeing walls badly laid, but they have a personal interest in getting fairly competent men before whom to plead. It is no pleasure to them to have a judge so ignorant or so weak that a good argument is thrown away upon him, or that you can feel no confidence that the opinion given to a client, or a point of law which you think clear, will be verified by the decision of the court. Hence the bar often con-

trives to make a party nomination for judicial office fall, not indeed on a leading barrister, because a leading barrister will not accept a place with $4000 a year, when he can make $14,000 by private practice, but on as competent a member of the party as can be got to take the post.

Having constantly inquired, in every State I visited wherein the system of popular elections to judgeships prevails, how it happened that the judges were not worse, I was usually told that the bar had interposed to prevent such and such a bad nomination, or had agreed to recommend such and such a person as a candidate, and that the party had yielded to the wishes of the bar. Occasionally, when the wirepullers are on their good behaviour, or the bar is exceptionally public-spirited, a person will be brought forward who has no claims except those of character and learning. But it is perhaps more common for the lawyers to put pressure on one or other party in nominating its party candidates to select capable ones.

These causes, and especially the last, go far to nullify the malign effects of popular election and short terms. But they cannot equally nullify the effect of small salaries. Accordingly, while corruption and partiality are uncommon among State judges, inferiority to the practising counsel is a conspicuous and frequent fault.

The changes of the last twenty years have been on the whole for the better. Some States which had vested the appointment of judges in the legislature, like Connecticut, or in the people, like Mississippi, have by recent constitutional amendments or new constitutions, given it to the governor with the consent of the legislature or of one House thereof. Others have raised the salaries, or lengthened the terms of the judges, or, like New York, have introduced both these reforms. Between 1860 and 1891, although the eight Western new States admitted within that period have all vested the choice of judges in the people, and although Kentucky in 1891 could not be induced, in spite of the decline of her Bench from its ancient fame, to restore the system of appointment by the executive which had prevailed till 1850, no one of the older States except Florida took appointments from legislature or governor to entrust them to popular vote. In this point at least,

the tide of democracy which went on rising for so many years, seems, if not receding, at least to have touched high-water mark. The American people, if sometimes bold in their experiments, have a fund of good sense which makes them watchful of results, and not unwilling to reconsider their former decisions.

CHAPTER XLII

STATE FINANCE

The financial systems in force in the several States furnish one of the widest and most instructive fields of study that the whole range of American institutions presents to a practical statesman, as well as to a student of comparative politics.

Here only a few points can be touched on, and I have selected the following for mention: —

Purposes for which State revenue is required.
Forms of taxation.
Exemptions from taxation.
Methods of collecting taxes.
Limitations imposed on the power of taxing.
State indebtedness.
Restrictions imposed on the borrowing power.

I. The budget of a State is seldom large, in proportion to the wealth of its inhabitants, because the chief burden of administration is borne not by the State, but by its subdivisions, the counties, and still more the cities and townships. The chief expenses which a State undertakes in its corporate capacity are — (1) The salaries of its officials, executive and judicial, and the incidental expenses of judicial proceedings, such as payments to jurors and witnesses; (2) the State volunteer militia; (3) charitable and other public institutions, such as State lunatic asylums, State universities, agricultural colleges, etc.; (4) grants to schools; (5) State prisons, comparatively few, since the prison is usually supported by the county; (6) State buildings and public works, including, in a few cases, canals; (7) payment of interest on State debts. Of the whole revenue collected in each State under State taxing laws, a comparatively small part is taken by the State itself and applied to State purposes. In 1882 only seven States raised

for State purposes a revenue exceeding $2,000,000. In 1891 the gross revenue of New York was $21,243,639 (pop. in 1890 6,000,000); of Ohio, $3,419,000 (pop. 3,680,000). These are small sums when compared either with the population and wealth of these States, or with the revenue raised in them by local authorities for local purposes. They are also small in comparison with what is raised by indirect taxation for Federal purposes.

II. The National government raises its revenue by indirect taxation, and by duties of customs and excise,[1] though it has the power of imposing direct taxes, and used that power freely during the Civil War. It has now again (1894) imposed an income tax,[2] exempting, however, smaller incomes. State revenue, on the other hand, arises almost wholly from direct taxation, since the Federal Constitution forbids the levying of import or export duties by a State, except with the consent of Congress, and directs the produce of any such duties as Congress may permit to be paid into the Federal treasury. The chief tax is in every State a property tax, based on a valuation of property, and generally of all property, real and personal, within the taxing jurisdiction.

The valuation is made by officials called appraisers or assessors, appointed by the local communities, though under general State laws. It is their duty to put a value on all taxable property; that is, speaking generally, on all property of whatever nature which they can discover or trace within the area of their authority. As the contribution, to the revenues of the State or county, leviable within that area is proportioned to the amount and value of taxable property situate within it, the local assessors have, equally with the property owners, an obvious motive for valuing on a low scale, for by doing so they relieve their community of part of its burden. The State accordingly endeavours to check and correct them by creating what is called a board of equalization, which compares and revises the valuations made by the various local officers, with the aim of having taxable property in each locality equally and fairly valued, and made thereby to

[1] Stamp duties were also resorted to during the Civil War, but at present none are levied by the National government.

[2] The Supreme Court has ruled that this statute was unconstitutional.

bear its due share of public burdens. Similarly a county has often an equalization board to supervise and adjust the valuations of the towns and cities within its limits. However, the existence of such boards does not overcome the difficulty of securing a really equal valuation, and the honest county or town which puts its property at a fair value suffers by paying more than its share. Valuations are generally made at a figure much below the true worth of property. In Connecticut, for instance, the law directs the market price to be the basis, but real estate is valued only at from one-third to three-fourths thereof. Indeed one hears everywhere in America complaints of inequalities arising from the varying scales on which valuers proceed.

A still more serious evil is the fact that so large a part of taxable property escapes taxation. Lands and houses cannot be concealed; cattle and furniture can be discovered by a zealous tax officer. But a great part, often far the largest part of a rich man's wealth, consists in what the Americans call "intangible property," notes, bonds, book debts, and Western mortgages. At this it is practically impossible to get, except through the declaration of the owner; and even if the owner is required to present his declaration of taxable property upon oath, he is apt to omit this kind of property.

In every part of the country one hears exactly this stated. The tax returns sent in are rarely truthful; and not only does a very large percentage of property escape its lawful burdens, but "the demoralization of the public conscience by the frequent administration of oaths, so often taken only to be disregarded, is an evil of the greatest magnitude. Almost any change would seem to be an improvement."

I have dwelt upon these facts, not only because they illustrate the difficulties inherent in a property tax, difficulties of course greater where such independent taxing authorities as the several States are close together, but also because they also help to explain the occasional bitterness of feeling among the American farmers as well as the masses against capitalists, much of whose accumulated wealth escapes taxation, while the farmer who owns his land, as well as the workingman who puts his savings into the house he lives in, is assessed and taxed upon this visible property. We may, in fact, say

of most States, that under the present system of taxation the larger is the city the smaller is the proportion of personalty reached by taxation (since concealment is easier in large communities), and the richer a man is the smaller in proportion to his property is the contribution he pays to the State. Add to this that the rich man bears less, in proportion to his income, of the burden of indirect taxation, since the protective tariff raises the price not merely of luxuries but of all commodities, except some kinds of food.

Besides the property tax, which is the main source of revenue, the States often levy taxes on particular trades or occupations, sometimes in the form of a licence tax, taxes on franchises enjoyed by a corporation, taxes on railroad stock, or (in a few States) taxes on collateral inheritances. Comparatively little resort has hitherto been had to the so-called "death-duties," *i.e.* probate, legacy, and succession duties, nor is much use made of an income tax. Five States, however, authorize it. As regards poll-taxes there is much variety of practice. Some State constitutions forbid such an impost, as "grievous and oppressive;" others direct it to be imposed, or allow the legislature to impose it, while about one-half do not mention it. The amount of a poll-tax is always small, $1 to $3: sometimes (as in Tennessee) the payment of it is made a pre-requisite to the exercise of the electoral franchise. It is scarcely ever imposed on women or minors.

III. In most States, certain descriptions of property are exempted from taxation, as, for instance, the buildings or other property of the State, or of any local community, burying grounds, schools and universities, educational, charitable, scientific, literary, or agricultural institutions or societies, public libraries, churches and other buildings or property used for religious purposes, tools and household furniture, farming implements, deposits in savings banks. Often too it is provided that the owner of personal property below a certain figure shall not pay taxes on it, and occasionally ministers of religion are allowed a certain sum (as for instance in New York, $1500) free from taxation.

No State can tax any bonds, debt certificates, or other securities issued by, or under the authority of, the Federal government, including the circulating notes commonly called

"greenbacks." This has been held to be the law on the construction of the Federal Constitution, and has been so declared in a statute of Congress. Many intricate questions have arisen on this doctrine; which, moreover, introduces an element of difficulty into State taxation, because persons desiring to escape taxation are apt to turn their property into these exempted forms just before they make their tax returns.

IV. Some of the State taxes, such, for instance, as licence taxes, or a tax on corporations, are directly levied by and paid to the State officials. But others, and particularly the property tax, which forms so large a source of revenue, are collected by the local authorities. The State having determined what income it needs, apportions this sum among the counties, or in New England sometimes directly among the towns, in proportion to their paying capacity, that is, to the value of the property situate within them.[1] So similarly the counties apportion not only what they have to pay to the State, but also the sum they have to raise for county purposes, among the cities and townships within their area, in proportion to the value of their taxable property. Thus, when the township or city authorities assess and collect taxes from the individual citizen, they usually collect at one and the same time three distinct sets of taxes, the State tax, the county tax, and the city or township tax. Retaining the latter for local purposes,[2] they hand on the two former to the county authorities, who in turn retain the county tax, handing on to the State what it requires. Thus trouble and expense are saved in the process of collecting, and the citizen sees in one tax-paper all he has to pay.

V. Some States, taught by their sad experience of reckless legislatures, limit by their constitutions the amount of taxation which may be raised for State purposes in any one year. Sometimes we find direction that no greater revenue shall be raised than the current needs of the State require, a rule which Congress would have done well to observe, seeing that a sur-

[1] As ascertained by the assessors and board of equalization.

[2] Sometimes, however, the town or township in its corporate capacity pays the State its share of the State tax, instead of collecting it specially from individual citizens.

plus revenue invites extravagant and reckless expenditure and gives opportunity for legislative jobbery.

It may be thought that the self-interest of the people is sufficient to secure economy and limit taxation. But, apart from the danger of a corrupt legislature, it is often remarked that as in many States a large proportion of the voters do not pay State taxes, the power of imposing burdens lies largely in the hands of persons who have no direct interest, and suppose themselves to have no interest at all, in keeping down taxes which they do not pay. So far, however, as State finance is concerned, this has been no serious source of mischief, and more must be attributed to the absence of efficient control over expenditure, and to the fact that (as in Congress) the committee which reports on appropriations of the revenue is distinct from that which deals with the raising of revenue by taxation.

Another illustration of the tendency to restrict the improvidence of representatives is furnished by the prohibitions in many constitutions to pass bills appropriating moneys to any private individual or corporation, or to authorize the payment of claims against the State arising under any contract not strictly and legally binding, or to release the claims which the State may have against railroads or other corporations. One feels, in reading these multiform provisions, as if the legislature was a rabbit seeking to issue from its burrow to ravage the crops wherever it could, and the people of the State were obliged to close every exit, because they could not otherwise restrain its inveterate propensity to mischief.

VI. Nothing in the financial system of the States better deserves attention than the history of the State debts, their portentous growth, and the efforts made, when the people had taken fright, to reduce their amount, and to set limits to them in the future.

Sixty to seventy years ago, when those rich and ample Western lands which now form the States of Ohio, Indiana, Illinois, Michigan, and Missouri were being opened up and settled, and again forty years ago, when the railway system was in the first freshness of its marvellous extension, and was filling up the lands along the Mississippi at an increasingly rapid rate, every one was full of hope; and States, counties,

and cities, not less than individual men, threw themselves eagerly into the task of developing the resources which lay around them. The States, as well as these minor communities, set to work to make roads and canals and railways; they promoted or took stock in trading companies, they started or subsidized banks, they embarked in, or pledged their credit for, a hundred enterprises which they were ill-fitted to conduct or supervise. Some undertakings failed lamentably, while in others the profits were grasped by private speculators, and the burden left with the public body. State indebtedness, which in 1825 (when there were twenty-four States) stood at an aggregate over the whole Union of $12,790,728, had in 1842 reached $203,777,916, in 1870 $352,866,898.

A part of the increase between the latter years was due to loans contracted for the raising and equipping of troops by many Northern States to serve in the Civil War, the intention being to obtain ultimate reimbursement from the National treasury. There was also a good deal, in the way of executed works, to show for the money borrowed and expended, and the States (in 1870 thirty-seven in number) had grown vastly in taxable property. Nevertheless the huge and increasing total startled the people, and, as everybody knows, some States repudiated their debts. The diminution in the total indebtedness of 1880, which stood at $290,326,643, and was the indebtedness of thirty-eight States and three Territories, is partly due to this repudiation. In 1890 the total stood at $223,107,883. Even after the growth of State debts had been checked (in the way to be presently mentioned), minor communities, towns, counties, but above all cities, trod in the same path, the old temptations recurring, and the risks seeming smaller because a municipality had a more direct and close interest than a State in seeing that its money or credit was well applied. Municipal indebtedness has advanced, especially in the larger cities, at a dangerously swift rate. Of the State and county debt much the largest part had been incurred for, or in connection with, so-called "internal improvements;" but of the city debt, though a part was due to the bounties given to volunteers in the Civil War, much must be set down to extremely lax and wasteful administration, and much more to mere stealing, facilitated by the habit of sub-

sidizing, or taking shares in, corporate enterprises which had excited the hopes of the citizens.

VII. The disease spread till it terrified the patient, and a remedy was found in the insertion in the constitutions of provisions limiting the borrowing powers of State legislatures. Fortunately the evil had been perceived in time to enable the newest States to profit by the experience of their predecessors. For the last thirty-five years, whenever a State has enacted a constitution, it has inserted sections restricting the borrowing powers of States and local bodies, and often also providing for the discharge of existing liabilities. Not only is the passing of bills for raising a State loan surrounded with special safeguards, such as the requirement of a two-thirds majority in each House of the legislature; not only is there a prohibition ever to borrow money for, or even to undertake, internal improvements (a fertile source of jobbery and waste, as the experience of Congress shows); not only is there almost invariably a provision that whenever a debt is contracted the same act shall create a sinking fund for paying it off within a few years, but in most constitutions the total amount of the debt is limited, and limited to a sum beautifully small in proportion to the population and resources of the State. Thus Wisconsin fixes its maximum at $200,000; Minnesota and Iowa at $250,000; Ohio at $750,000; Wyoming at one and Idaho at one and one-half per cent of the assessed value of taxable property; Nebraska and Montana at $100,000; prudent Oregon at $50,000; and the great and wealthy State of Pennsylvania, with a population now exceeding 5,300,000 (Constitution of 1873, Art. ix. § 4), at $1,000,000.

In four-fifths of the States, including all those with recent constitutions, the legislature is forbidden to "give or lend the credit of the State in aid of any person, association, or corporation, whether municipal or other, or to pledge the credit of the State in any manner whatsoever for the payment of the liabilities present or prospective of any individual association, municipal or other corporation," as also to take stock in a corporation, or otherwise embark in any gainful enterprise. Many constitutions also forbid the assumption by the State of the debts of any individual or municipal corporation.

The care of the people for their financial freedom and safety

extends even to local bodies. Many of the recent constitutions limit, or direct the legislature to limit, the borrowing powers of counties, cities, or towns, sometimes even of incorporated school districts, to a sum not exceeding a certain percentage on the assessed value of the taxable property within the area in question. This percentage is usually five per cent. Sometimes also the amount of the tax leviable by a local authority in any year is restricted to a definite sum — for instance, to one-half per cent on the valuation. And in all the States but seven, cities, counties, or other local incorporated authorities are forbidden to pledge their credit for, or undertake the liabilities of, or take stock in, or otherwise give aid to, any undertaking or company. Sometimes this prohibition is absolute; sometimes it is made subject to certain conditions, and may be avoided by their observance. Sometimes there is a direction that any municipality creating a debt must at the same time provide for its extinction by a sinking fund. Sometimes the restrictions imposed apply only to a particular class of undertakings — *e.g.* banks or railroads. The differences between State and State are endless; but everywhere the tendency is to make the protection against local indebtedness and municipal extravagance more and more strict; nor will any one who knows these local authorities, and the temptations, both good and bad, to which they are exposed, complain of the strictness.

The provisions above described have had the effect of steadily reducing the amount of State debts, although the wealth of the country makes rapid strides. This reduction was between 1870 and 1880, about 25 per cent in the case of State debts, and in that of county, town, and school district debts about 8 per cent. In the decade ending with 1890 there was a large reduction in State debts, — $267,218,760, — (nearly half of this, however, due to scaling down of debts of Southern States); but county debts rose considerably and the school debts still more largely. In cities there was, within the decade 1870–80, not only no reduction, but an increase of over 100 per cent, possibly as much as 130 per cent. In 1890 the aggregate debt was a little higher than it had been in 1880, but smaller in proportion to the population, which had vastly increased.

This striking difference between the cities and the States may be explained in several ways. One is that cities cannot repudiate, while sovereign States can and do.[1] Another may be found in the later introduction into State constitutions of restrictions on the borrowing powers of municipalities. But the chief cause is to be found in the conditions of the government of great cities, where the wealth of the community is largest, and is also most at the disposal of a multitude of ignorant voters. Several of the greatest cities lie in States which did not till recently, or have not even now, imposed adequate restrictions on the borrowing power of city councils.

[1] In some parts of New England the city, town, or other municipal debt is also the personal debt of every inhabitant, and is therefore an excellent security.

CHAPTER XLIII

THE WORKING OF STATE GOVERNMENTS

We have now to inquire how the organs of the government which have been described play into one another in practice. To say that a State is something lower than the nation but greater than a municipality, is to say what is obvious, but not instructive; for the peculiarity of the State in America is that it combines some of the features which are to Europeans characteristic of a nation and a nation only, with others that belong to a municipality.

The State governments, as has been observed already, bear a family likeness to the National or Federal government, a likeness due not only to the fact that the latter was largely modelled after the systems of the old thirteen States, but also to the influence which the Federal Constitution has exerted ever since 1789 on those who have been drafting or amending State constitutions. Thus the Federal Constitution has been both child and parent. Where the State constitutions differ from the Federal, they invariably differ in being more democratic. It still expresses the doctrines of 1787. They express the views of later days, when democratic ideas have been more rampant, and men less cautious than the sages of the Philadelphia Convention have given legal form to popular beliefs. This difference, which appears not only in the mode of appointing judges, but in the shorter terms which the States allow to their officials and senators, comes out most clearly in the relations established between the legislative and the executive powers. The National executive, though disjoined from the legislature in a way strange to Europeans, is nevertheless all of a piece. The President is supreme; his ministers are his subordinates, chosen by him from among his political associates. They act under his orders; he is responsible for their conduct. But in the

States there is nothing even distantly resembling a cabinet. The chief executive officials are directly elected by the people. They hold by a title independent of the State governor. They are not, except so far as some special statute may provide, subject to his directions, and he is not responsible for their conduct, since he cannot control it. As the governor need not belong to the party for the time being dominant in the legislature, so the other State officials need not be of the same party as the governor.[1] They may even have been elected at a different time, or for a longer period.

It might be thought that this divergence would give rise to grave practical difficulties. But as a rule the executive business of a State is not such as to need any unity of policy, and therefore does not depend upon harmony of view or purpose among those who manage it. Everything in the nature of State policy belongs to the legislature, and to the legislature alone.

Compare the Federal President with the State governor. The former has foreign policy to deal with, the latter has none. The former has a vast patronage, the latter has scarcely any. The former has the command of the army and navy, the latter has only the militia, insignificant in ordinary times. The former has a post-office, but there is no State postal-service. Little remains to the governor except his veto, which is not so much an executive as a legislative function; the duty of maintaining order, which becomes important only when insurrection or riot breaks out; and the almost mechanical function of representing the State for various matters of routine, such as demanding from other States the extradition of offenders, issuing writs for the election of congressmen or of the State legislature, receiving the reports of the various State officials.

These officials, even the highest of them who correspond to the cabinet ministers in the National government, are either mere clerks, performing work, such as that of receiving and paying out State moneys, strictly defined by statute, and usually checked by other officials, or else are in the nature of commissioners of inquiry, who may inspect and report, but can take no independent action of importance. Policy does not lie

[1] Thus Massachusetts elected in 1891 (and again in 1892) a Democratic governor, but her other State officials from the Republican party.

within their province; even in executive details their discretion is confined within narrow limits. They have, no doubt, from the governor downwards, opportunities for jobbing and malversation; but even the less scrupulous are restrained from using these opportunities by the fear of some investigating committee of the legislature, with possible impeachment or criminal prosecution as a consequence of its report. Holding for terms which seldom exceed two or three years, they feel the insecurity of their position; but the desire to earn re-election by the able and conscientious discharge of their functions, is a less effective motive than it would be if the practice of re-electing competent men were more frequent. Unfortunately, here, as in Congress, the tradition of many States is, that when a man has enjoyed an office, however well he may have served the public, some one else ought to have the next turn.

The reason, therefore, why the system I have sketched rubs along in the several States is, that the executive has little to do, and comparatively small sums to handle. The further reason why it has so little to do is two-fold. Local government is so fully developed that many functions, which in Europe would devolve on a central authority, are in all American States left to the county, or the city, or the township, or the school district. These minor divisions narrow the province of the State, just as the State narrows the province of the central government. And the other reason is, that legislation has in the several States pushed itself to the farthest limits, and so encroached on subjects which European legislatures would leave to the executive, that executive discretion is extinct, and the officers are the mere hands of the legislative brain, which directs them by statutes drawn with extreme minuteness, carefully specifies the purposes to which each money grant is to be applied, and supervises them by inquisitorial committees.

It is a natural consequence of these arrangements that State office carries little either of dignity or of power. A place is valued chiefly for its salary, or for such opportunities of obliging friends or securing commissions on contracts as it may present, though in the greatest States the post of attorney-general or comptroller is often sought by able men. A State governor, however, is not yet a nonentity. In more than one State a sort of perfume from the old days lingers round the office, as

in Massachusetts, where the traditions of last century were renewed by the eminent man who occupied the chair of the commonwealth during the War of Secession and did much to stimulate and direct the patriotism of its citizens. Though no one would nowadays, like Mr. Jay in 1795, exchange the chief-justiceship of the United States for the governorship of his State, a cabinet minister will sometimes seek to quit his post in order to obtain the governorship of a great State like New York. In all States, the governor, as the highest official and the depositary of State authority, may at any moment become the pivot on whose action public order turns. In the Pennsylvania riots of 1877 it was the accidental absence of the governor on a tour in the West which enabled the forces of sedition to gather strength. During the more recent disturbances which large strikes, especially among railway employés, have caused in the West, the prompt action of a governor has preserved or restored tranquillity in more than one State; while the indecision of the governor of an adjoining one has emboldened strikers to stop traffic, or to molest workmen who had been hired to replace them. So in a commercial crisis, like that which swept over the Union in 1837, when the citizens are panic-stricken and the legislature hesitates, much may depend on the initiative of the governor, to whom the eyes of the people naturally turn. His right of suggesting legislative remedies, usually neglected, then becomes significant, and may abridge or increase the difficulties of the community.

It is not, however, as an executive magistrate that a State governor usually makes or mars a reputation, but in his quasi-legislative capacity of agreeing to or vetoing bills passed by the legislature. The merit of a governor is usually tested by the number and the boldness of his vetoes; and one may see a governor appealing to the people for re-election on the ground that he had defeated in many and important instances the will of their representatives solemnly expressed in the votes of both Houses. That such appeals should be made, and often made successfully, is due not only to the distrust which the people entertain of their legislatures, but also, to their honour be it said, to the respect of the people for courage. They like above all things a strong man.

This view of the governor as a check on the legislature

explains why it is deemed rather a gain than an injury to the State that he should belong to the party which is for the time being in a minority in the legislature. How the phenomenon occurs may be seen by noting the different methods of choice employed. The governor is chosen by a mass vote of all citizens over the State. The representatives are chosen by the same voters, but in districts. Thus one party may have a majority on a gross poll of the whole State, but may find itself in a minority in the larger number of electoral districts. This happens in New York State, on an average, in two years out of every three. The mass vote shows a Democratic majority, because the Democrats are overwhelmingly strong in New York City, and some other great centres of population. But in the rural districts and most of the smaller towns the Republican party commands a majority sufficient to enable them to carry most districts. Hence, while the governor is usually a Democrat, the legislature is often Republican. Little trouble need be feared from the opposition of the two powers, because such issues as divide the National parties have scarce any bearing on State affairs. Some good may be hoped, because a governor of the other party is more likely to check or show up the misdeeds of a hostile Senate or Assembly than one who, belonging to the group of men which guides the legislature, has a motive for working with them, and may expect to share any gains they can amass.

Thus we are led back to the legislature, which is so much the strongest force in the several States that we may almost call it the government and ignore all other authorities. Let us see how it gets on without that guidance which an executive ministry supplies to the chambers of every free European country.

As the frame of a State government generally resembles the National government, so a State legislature resembles Congress. In most States it exaggerates the characteristic defects of Congress. It has fewer able and high-minded men among its members. It has less of recognized leadership. It is surrounded by temptations relatively greater. It is guarded by a less watchful and less interested public opinion. But before we inquire what sort of men fill the legislative halls, let us ask what kinds of business draw them there.

The matter of State legislation may be classified under three heads: —

I. Ordinary private law, *i.e.* contracts, torts, inheritance, family relations, offences, civil and criminal procedure.

II. Administrative law, including the regulation of municipal and rural local government, public works, education, the liquor traffic, vaccination, adulteration, charitable and penal establishments, the inspection of mines or manufactories, together with the general law of corporations, of railroads, and of labour, together also with taxation, both State and local, and the management of the public debt.

III. Measures of a local and special nature, *i.e.* bills for chartering and incorporating gas, water, canal, tramway, or railway companies, or for conferring franchises in the nature of monopolies or privileges upon such bodies, or for altering their constitutions, for incorporating cities and minor communities and regulating their affairs.

Comparing these three classes of business, between the first and second of which it is no doubt hard to draw a sharp line, we shall find that bills of the second class are more numerous than those of the first, bills of the third more numerous than those of the other two put together. Ordinary private law, the law which guides or secures us in the every day relations of life, and upon which nine-tenths of the suits between man and man are founded, is not greatly changed from year to year in the American States. Many Western, and a few Eastern States have made bold experiments in the field of divorce, others have added new crimes to the statute-book and amended their legal procedure. But commercial law, as well as the law of property and civil rights in general, remains tolerably stable. People are satisfied with things as they are, and the influence of the legal profession is exerted against tinkering. In matters of the second class, which I have called administrative, because they generally involve the action of the State or of some of the communities which exist within it, there is more legislative activity. Every session sees experiments tried in this field, generally with the result of enlarging the province of government, both by interfering with the individual citizen and by attempting to do things for him which apparently he either does not do or does not do well for himself.

But the general or "public" legislation is dwarfed by the "private bill" legislation which forms the third of our classes. The bills that are merely local or special outnumber general bills everywhere, and outnumber them enormously in those States which do not require corporations to be formed under general laws. Such special bills are condemned by thoughtful Americans, not only as confusing the general law, but because they furnish, unless closely watched, opportunities for perpetrating jobs, and for inflicting injustice on individuals or localities in the interest of some knot of speculators. They are one of the scandals of the country. But there is a further objection to their abundance in the State legislatures. They are a perennial fountain of corruption. Promoted for pecuniary ends by some incorporated company or group of men proposing to form a company, their passage is secured by intrigue, and by the free expenditure of money which finds its way in large sums to the few influential men who control a State Senate or Assembly, and in smaller sums to those among the rank and file of members who are accessible to these solid arguments and careless of any others. It is the possibility of making profit in this way out of a seat in the legislature which draws to it not a few men in those States which, like New York, Pennsylvania, or Illinois, offer a promising field for large pecuniary enterprises. Where the carcase is there will the vultures be gathered together. The money power, which is most formidable in the shape of large corporations, chiefly attacks the legislatures of these great States. It is, however, felt in nearly all States. And even where, as is the case in most States, only a small minority of members are open to bribes, the opportunity which these numerous local and special bills offer to a man of making himself important, of obliging his friends, of securing something for his locality and thereby confirming his local influence, is sufficient to make a seat in the legislature desired chiefly in respect of such bills, and to obscure, in the eyes of most members, the higher functions of general legislation which these assemblies possess.

One form of this special legislation is peculiarly attractive and pernicious. It is the power of dealing by statute with the municipal constitution and actual management of cities. Cities grow so fast that all undertakings connected with them

are particularly tempting to speculators. City revenues are so large as to offer rich plunder to those who can seize the control of them. The vote which a city casts is so heavy as to throw great power into the hands of those who control it, and enable them to drive a good bargain with the wirepullers of a legislative chamber. Hence the control exercised by the State legislature over city government is a most important branch of legislative business, a means of power to scheming politicians, of enrichment to greedy ones, and if not of praise to evil-doers, yet certainly of terror to them that do well.

We are now in a position, having seen what the main business of a State legislature is, to inquire what is likely to be the quality of the persons who compose it. The conditions that determine their quality may be said to be the following:—

I. The system of selection by party conventions—a system which tends to prevent the entrance of good men and to favour that of bad ones.

II. The habit of choosing none but a resident to represent an electoral district, a habit which narrows the field of choice, and not only excludes competent men from other parts of the State, but deters able men generally from entering State politics, since he who loses his seat for his own district cannot find his way back to the legislature as member for any other.

III. The fact that the capital of a State, *i.e.* the meeting-place of the legislature and residence of the chief officials, is usually a small town, at a distance from the most populous city or cities of the State, and therefore a place neither attractive socially nor convenient for business men or lawyers, and which, it may be remarked in passing, is more shielded from a vigilant public opinion than is a great city, with its keen and curious press.

IV. The nature of the business that comes before a State legislature. As already explained, by far the largest part of this business excites little popular interest and involves no large political issues. Unimportant it is not. Nothing could well be more important than to repress special legislation, and deliver cities from the fangs of the spoiler. But its importance is not readily apprehended by ordinary people, the mischiefs that have to be checked being spread out over a multitude of bills, most of them individually insignificant,

however ruinous in their cumulated potency. Hence a leading politician seldom troubles himself to enter a State legislature, while the men who combine high character with talent and energy are too much occupied in practising their profession or pushing their business to undertake the dreary task of wrangling over gas and railroad bills in committees, or exerting themselves to win some advantage for the locality that returns them.

I have not mentioned among these depressing conditions the payment of salaries to members, because it makes little difference. It is no doubt an attraction to some of the poorer men. But in attracting them it does not serve to keep out any better men. Probably the sense of public duty would be keener if legislative work was not paid at all. But, looking at the question practically, I doubt whether the discontinuance of salaries would improve the quality of American legislators. The drawbacks to the position which repel the best men, the advantages which attract inferior men, would remain the same as now; and there is nothing absurd in the view that the places of those who might cease to come if they did not get their five dollars a day would be taken by men who would manage to make as large an income in a less respectable way.

The legislatures of the Southern States stand, on the whole, below those of New England and of the North-west, though in most a few men of exceptional ability and standing may be found.

The lowest place belongs to the States which, possessing the largest cities, have received the largest influx of European immigrants, and have fallen most completely under the control of unscrupulous party managers. Of course even in these States the majority of the members are not bad men, for the majority come from the rural districts or smaller towns, where honesty and order reign as they do generally in Northern and Western America outside a few large cities. Many of them are farmers or small lawyers, who go up meaning to do right, but fall into the hands of schemers who abuse their inexperience and practise on their ignorance.

The corrupt member has several methods of making gains. One, the most obvious, is to exact money or money's worth for his vote. A second is to secure by it the support of a group

of his colleagues in some other measure in which he is personally interested, as, for instance, a measure which will add to the value of land near a particular city. This is "log-rolling," and is the most difficult method to deal with, because its milder forms are scarcely distinguishable from that legitimate give and take which must go on in all legislative bodies. It is, however, deemed so mischievous, that four new constitutions have expressly enacted that it shall be held to constitute the offence of solicitation or bribery, and be punishable accordingly. A third is black-mailing. A member brings in a bill either specially directed against some particular great corporation, probably a railway, or proposing so to alter the general law as in fact to injure such a corporation, or a group of corporations. He intimates privately that he is willing to "see" the directors or the law-agents of the corporation, and is in many cases bought off by them, keeping his bill on the paper till the last moment so as to prevent some other member from repeating the trick. Of course the committees are the focus of intrigue, and the chairmanship of a committee the position which affords the greatest facilities for an unscrupulous man. Round the committees there buzzes that swarm of professional agents which is called "the lobby," soliciting the members, threatening them with trouble in their constituencies, plying them with all sorts of inducements, treating them to dinners, drinks, and cigars.

I escape from this Stygian pool to make some observations which seem applicable to State legislatures generally, and not merely to the most degraded.

The spirit of localism, surprisingly strong everywhere in America, completely rules them. A member is not a member for his State, chosen by a district but bound to think first of the general welfare of the commonwealth. He is a member for Brownsville, or Pompey, or the seventh district, and so forth, as the case may be. His first and main duty is to get the most he can for his constituency out of the State treasury, or by means of State legislation. No appeal to the general interest would have weight with him against the interests of that spot. What is more, he is deemed by his colleagues of the same party to be the sole exponent of the wishes of the spot, and solely entitled to handle its affairs. If he approves

a bill which affects the place and nothing but the place, that is conclusive. Nobody else has any business to interfere. This rule is the more readily accepted, because its application all round serves the private interest of every member alike, while members of more enlarged views, who ought to champion the interests of the State and sound general principles of legislation, are rare. When such is the accepted doctrine, as well as invariable practice, log-rolling becomes natural and almost legitimate. Each member being the judge of the measure which touches his own constituency, every other member supports that member in passing the measure, expecting in return the like support in a like cause. He who in the public interest opposes the bad bill of another, is certain to find that other opposing, and probably with success, his own bill however good.

The defects noted (Chapters XIII.–XVI.) as arising in Congress from the want of recognized leadership and of persons officially bound to represent and protect the interests of the people at large reappear in the State legislatures, on a smaller scale, no doubt, but in an aggravated form, because the level of ability is lower and the control of public opinion less. There is no one to withstand the petty localism already referred to; no one charged with the duty of resisting proposals which some noisy section may demand, but whose ultimate mischief, or pernicious effect as precedents, thoughtful men perceive. There are members for districts, but no members for the people of the State. Thus many needless bills and many bad bills are passed. And when some difficult question arises, it may happen that no member is found able to grapple with it. Sometimes the governor comes to the rescue by appointing a commission of eminent men to devise and suggest to the legislature a measure to deal with the question. Sometimes the Constitution contains a provision that the judges shall report upon all defects in the judicial system in order that the needed reform may be thereupon carried. Such are the roundabout ways in which efforts are made to supply the want of capacity in the legislators, and the absence of a proper system of co-operation between the executive and legislative departments.

There is in State legislators, particularly in the West, a

restlessness which, coupled with their limited range of knowledge and undue appreciation of material interests, makes them rather dangerous. Meeting for only a few weeks in the year, or probably in two years, they are alarmingly active during those weeks, and run measures through whose results are not apprehended till months afterwards. It is for this reason, no less than from the fear of jobbery, that the meeting of the legislature is looked forward to with anxiety by the "good citizens" in these communities, and its departure hailed as a deliverance.

Both this restlessness and the general character of State legislation are illustrated by the enormous numbers of bills introduced in each session, comparatively few of which pass, because the time is too short, or opposing influences can be brought to bear on the committees.

Nothing is more remarkable about these State legislators than their timidity. No one seems to think of having an opinion of his own. In matters which touch the interests of his constituents, a member is, of course, their humble servant. In burning party questions — they are few, and mostly personal — he goes with his party. In questions of general public policy he looks to see how the cat jumps; and is ready to vote for anything which the people, or any active section of the people, cry out for, though of course he may be secretly unfriendly, and may therefore slyly try to spoil a measure. This want of independence has some good results. It enables a small minority of zealous men, backed by a few newspapers, to carry schemes of reform which the majority regard with indifference or hostility. Thus in bodies so depraved as the legislatures of New York and Pennsylvania, bills have lately been passed improving the charters of cities, creating a secret ballot, and even establishing an improved system of appointments to office. A few energetic reformers went to Albany and Harrisburg to strengthen the hands of the little knot of members who battle for good government there, and partly frightened, partly coaxed a majority of the Senate and House into adopting proposals opposed to the interests of professional politicians. Some ten years ago, two or three high-minded and sagacious ladies obtained by their presence at Albany the introduction of reforms into the charitable institutions of New

York City. The ignorance and heedlessness of the "professionals," who do not always see the results of legislative changes, and do not look forward beyond the next few months, help to make such triumphs possible; and thus, as the Bible tells us that the wrath of man shall praise God, the faults of politicians are turned to work for righteousness.

In the recent legislation of many States, especially Western States, there is a singular mixture of philanthropy and humanitarianism with the folly and jobbery I have described, like threads of gold and silver woven across a warp of dirty sacking. Every year sees bills passed to restrict the sale of liquor, to prevent the sale of indecent or otherwise demoralizing literature, to protect women and children, to stamp out lotteries and gambling houses, to improve the care of the blind, the insane, and the poor, which testify to a warm and increasing interest in all good works. These measures are to be explained, not merely by that power which an active and compact minority enjoys of getting its own way against a crowd of men bent each on his own private gain, and therefore not working together for other purposes, but also by the real sympathy which many of the legislators, especially in the rural districts, feel for morality and for suffering. Even the corrupt politicians of Albany were moved by the appeals of the philanthropic ladies to whom I have referred; much more then would it be an error to think of the average legislator as a bad man, merely because he will join in a job, or deal unfairly with a railroad. Laxity in the discharge of a political trust is a kind of fault which in some parts of the country is considered a comparatively venal offence. It is also one which is often hard to prove, even where grave suspicion exists. The newspapers accuse everybody; the ordinary citizen can seldom tell who is innocent and who is guilty. He makes a sort of compromise in his own mind by thinking nobody quite black, but everybody gray. And he goes on to think that what everybody does cannot be very sinful.

CHAPTER XLIV

REMEDIES FOR THE FAULTS OF STATE GOVERNMENTS

The defects in State governments, which our examination of their working has disclosed, are not those we should have expected. It might have been predicted, and it was at one time believed, that these authorities, consumed by jealousy and stimulated by ambition, would have been engaged in constant efforts to extend the sphere of their action and encroach on the National government. This does not happen, and seems most unlikely to happen. The people of each State are now not more attached to the government of their own commonwealth than to the Federal government of the nation, whose growth has made even the greatest State seem insignificant beside it.

A study of the frame of State government, in which the executive department is absolutely severed from the legislative, might have suggested that the former would become too independent, misusing its powers for personal or party purposes, while public business would suffer from the want of concert between the two great authorities, that which makes and that which carries out the law.

This also has proved in practice to be no serious evil. The legislature might indeed conceivably work better if the governor, or some of his chief officials, could sit in it and exercise an influence on its deliberations. Such an adaptation of the English cabinet system has, however, never been thought of for American States; and the example of the provincial legislatures of Canada, in each of which there is a responsible ministry sitting in the legislature, does not seem to have recommended it for imitation. Those who founded the State governments did not desire to place any executive leaders in a representative assembly. Probably they were rather inclined to fear that the governor, not being accountable to the

legislature, would retain too great an independence. The recent creation of various administrative officers or boards has gone some way to meet the difficulties which the incompetence of the legislatures causes, for these officers or boards frequently prepare bills which some member of the legislature introduces, and which are put through without opposition, perhaps even without notice, except from a handful of members. On the whole, the executive arrangements of the State work well, though they might, in the opinion of some judicious publicists, be improved by vesting the appointment of the chief officials in the governor, instead of leaving it to direct popular election. This would tend to give more unity of purpose and action to the administration. The collisions which occur in practice between the governor and the legislature relate chiefly to appointments, that is to say, to personal matters, not involving issues of State policy.

The real blemishes in the system of State government are all found in the composition or conduct of the legislatures. They are the following: —

Inferiority, as respects knowledge, skill, and sometimes also conscience, of the bulk of the men who fill these bodies.
Improvidence in matters of finance.
Heedlessness in passing administrative bills.
Want of proper methods for dealing with local and special bills.
Failure of public opinion adequately to control legislation, and particularly local and special bills.

The practical result of these blemishes has been to create a large mass of State and local indebtedness which ought never to have been incurred, to allow foolish experiments in law-making to be tried, and to sanction a vast mass of private enterprises, in which public rights and public interests become the sport of speculators, or a source of gain to monopolists, with the incidental consequence of demoralizing the legislators themselves and creating an often unjust prejudice against all corporate undertakings.

What are the checks or remedies which have been provided to limit or suppress these evils? Any one who has followed the account given of the men who compose the legislatures

and the methods they follow will have felt that these checks must be considerable, else the results would have been worse than those we see. All remedies are directed against the legislative power, and may be arranged under four heads.

First, there is the division of the legislature into two Houses. A job may have been smuggled through one House, but the money needed to push it through the other may be wanting. Some wild scheme, professing to benefit the farmers, or the cattlemen, or the railroad employés, may, during its passage through the Assembly, rouse enough attention from sensible people to enable them to stop it in the Senate. The mere tendency of two chambers to disagree with one another is deemed a benefit by those who hold, as the Americans do, that every new measure is *prima facie* likely to do more harm than good. Most bills are bad — *ergo*, kill as many as you can. Each House, moreover, has, even in such demoralized State legislatures as those of New York or Pennsylvania, a satisfaction, if not an interest, in unveiling the tricks of the other.

Secondly, there is the veto of the governor. How much the Americans value this appears from the fact that, whereas in 1789 there was only one State, Massachusetts, which vested this power in the chief magistrate, all of the now existing States except four give it to him. Some constitutions (including all the new ones) contain the salutary provision that the governor may reject one or more items of an appropriation bill (sometimes even of any bill) while approving the bill as a whole; and this has been found to strengthen his hands immensely in checking the waste of public money on bad enterprises. This veto power, the great stand-by of the people of the States, illustrates admirably the merits of concentrated responsibility. The citizens, in choosing the governor to represent the collective authority of the whole State, lay on him the duty of examining every bill on its merits. He cannot shelter himself behind the will of the representatives of the people, because he is appointed to watch and check those representatives as a policeman watches a suspect. He is bound to reject the bill, not only if it seems to him to infringe the constitution of the State, but also if he thinks it in any wise injurious to the public, on pain of being himself suspected

of carelessness, perhaps of complicity in some corrupt design. The legislature may, of course, pass the bill over his veto by a two-thirds vote; but although there may exist a two-thirds majority in favour of the measure, they may fear, after the veto has turned the lamp of public opinion upon it, to take so strong a step. There are, of course, great differences between one governor and another, as well as between one State and another, as regards the honesty with which the power is exercised, for it may be, and sometimes is, used by a "Ring" governor to defeat measures of reform. But it is a real and effective power everywhere; and in the greatest States, where the importance of the office sometimes secures the election of an able and courageous man, it has done excellent service.

Thirdly, there are limitations imposed on the competence of the legislature. I have already mentioned some of these limitations, the most numerous, and at present the most important of which relate to special and local bills. These bills, while they destroy the harmony and simplicity of the law, and consume the time of the legislature, are also so fertile a source of jobbery that to expunge them or restrict them to cases where a special statute was really needed, would be a great benefit. The constitutional prohibitions described effect this to some extent. But the powers of evil do not yield without a battle. All sorts of evasions are tried, and some succeed. For instance, there is a prohibition in the Constitution of New York to pass any but general laws relating to the government of cities. An act is passed which is expressed to apply to cities with a population exceeding one hundred thousand but less than two hundred thousand. There happens to be only one such city in the State, viz. Buffalo, but as there might be more, the law is general, and escapes the prohibition. So the Constitution of Ohio expressly provides that the legislature "shall pass no special act conferring corporate powers." But in 1890 nearly fifty such acts were passed, the provision being evaded by the use of general enacting words which can in fact apply only to one place.

Provisions against special legislation are also evaded in another way, viz. by passing acts which, because they purport to amend general acts, are themselves deemed general. Where evasions of this kind become frequent the confusion of

the statute-book is worse than ever, because you cannot tell without examination whether an act is general or special.

Some one may remark that there are two material differences between the position of State judges and that of the Federal judges. The latter are not appointed by a State, and are therefore in a more independent position when any question of conflict between State laws or constitutions and the Federal Constitution or statutes comes before them. Moreover they hold office for life, whereas the State judge usually holds for a term of years, and has his re-election to think of. Can the State judge then be expected to show himself equally bold in declaring a State statute to be unconstitutional? Will he not offend the legislature, and the party managers who control it, by flying in their faces?

The answer is that although the judge may displease the legislature if he decides against the validity of an unconstitutional statute, he may displease the people if he decides for it; and it is safer to please the people than the legislature. The people at large may know little about the matter, but the legal profession know, and are sure to express their opinion. The profession look to the courts to save them and their clients from the heedlessness or improbity of the legislature, and will condemn a judge who fails in this duty. Accordingly, the judges seldom fail. They knock about State statutes most unceremoniously, and they seldom suffer for doing so. In one case only is their position a dangerous one. When the people, possessed by some strong desire or sentiment, have either by the provisions of a new constitution, or by the force of clamour, driven the legislature to enact some measure meant to cure a pressing ill, they may turn angrily upon the judge who holds that measure to have been unconstitutional. This has several times happened, and is always liable to happen where elective judges hold office for short terms, with the unfortunate result of weakening the fortitude of the judges. In 1786 the Supreme Court of Rhode Island decided that an act passed by the legislature was invalid, because contravening the provision of the Colonial Charter (which was then still the Constitution of the State) securing to every accused person the benefit of trial by jury. The legislature were furious, and summoned the judges to appear before them and explain the grounds of

their decision. The attempt to dismiss them failed, but the judges were not re-elected by the legislature when their term of office expired at the end of the year.

It will be seen from what has been said that the judges are an essential part of the machinery of State government. But they are so simply as judges, and not as invested with political powers or duties. They have not received, any more than the Federal judges, a special commission to restrain the legislature or pronounce on the validity of its acts. There is not a word in the State constitutions, any more than in the Federal Constitution, conferring any such right upon the courts, or indeed conferring any other right than all courts of law must necessarily enjoy. When they declare a statute unconstitutional they do so merely in their ordinary function of expounding the law of the State, its fundamental law as well as its laws of inferior authority.

So far we have been considering restrictions imposed on the competence of the legislature, or on the methods of its procedure. We now come to the fourth and last of the checks which the prudence of American States imposes. It is a very simple, not to say naïve, one. It consists in limiting the time during which the legislature may sit. Formerly these bodies sat, like the English Parliament, so long as they had business to do. The business seldom took long. When it was done, the farmers and lawyers naturally wished to go home, and home they went. But when the class of professional politicians grew up, these wholesome tendencies lost their power over a section of the members. Politics was their business, and they had none other to call them back to the domestic hearth. They had even a motive for prolonging the session, because they prolonged their legislative salary, which was usually paid by the day. Thus it became the interest of the tax-payer to shorten the session. His interest, however, was still stronger in cutting short the jobs and improvident bestowal of moneys and franchises on which he found his representatives employed. Accordingly most States have fixed a number of days beyond which the legislature may not sit. Many of these fix it absolutely; but a few prefer the method of cutting off the pay of their legislators after the prescribed number of days has expired, so that if they do continue to devote them-

selves still longer to the work of law-making, their virtue shall be its own reward. Experience has, however, disclosed a danger in these absolutely limited sessions. It is that of haste and recklessness in rushing bills through without due discussion. Sometimes it happens that a bill introduced in response to a vehement popular demand is carried with a run (so to speak), because the time for considering it cannot be extended, whereas longer consideration would have disclosed its dangers.

Many recent constitutions have tried another and probably a better expedient. They have made sessions less frequent. At one time every legislature met once a year. Now in all the States but five it is permitted to meet only once in two years. Within the last fourteen years, at least seven States have changed their annual sessions to biennial. It does not appear that the interests of the commonwealths suffer by this suspension of the action of their chief organ of government. On the contrary, they get on so much better without a legislature that certain bold spirits ask whether the principle ought not to be pushed farther.

The better citizens have found it so difficult and troublesome to reform the legislatures that they have concluded to be content with curing such and so many symptoms as they can find medicines for, and waiting to see in what new direction the virus will work. "After all," they say, "the disease, though it is painful and vexing, does not endanger the life of the patient, does not even diminish his strength. The worst that the legislatures can do is to waste some money, and try some foolish experiments from which the good sense of the people will presently withdraw. Every one has his crosses to bear, and ours are comparatively light." All which is true enough, but ignores two important features in the situation, one, that the constitutional organs of government become constantly more discredited, the other that the tremendous influence exerted by wealth and the misuse of public rights permitted to capitalists, and especially to companies, have created among the masses of the people ideas which may break out in demands for legislation of a new and dangerous kind.

The survey of the State governments which we have now completed suggests several reflections.

One of these is that the political importance of the States is no longer what it was in the early days of the Republic. Although the States have grown enormously in wealth and population, they have declined relatively to the central government. The excellence of State laws and the merits of a State administration make less difference to the inhabitants than formerly, because the hand of the National government is more frequently felt. The questions which the State deals with, largely as they influence the welfare of the citizen, do not touch his imagination like those which Congress handles, because the latter determine the relations of the Republic to the rest of the world, and affect all the area that lies between the two oceans. The State set out as an isolated and self-sufficing commonwealth. It is now merely a part of a far grander whole, which seems to be slowly absorbing its functions and stunting its growth, as the great tree stunts the shrubs over which its spreading boughs have begun to cast their shade.

I do not mean to say that the people have ceased to care for their States; far from it. They are proud of their States, even where there may be little to be proud of. But if these commonwealths meant to their citizens what they did in the days of the Revolution, if they commanded an equal measure of their loyalty, and influenced as largely their individual welfare, the State legislatures would not be left to professionals or third-rate men. The truth is that the State has shrivelled up. It retains its old legal powers over the citizens, its old legal rights as against the central government. But it does not interest its citizens as it once did. Men do not now say, like Ames in 1782, that their State is their country. And as the central government overshadows it in one direction, so the great cities have encroached upon it in another. The population of a single city is sometimes a fourth or a fifth part of the whole population of the State; and city questions interest this population more than State questions do; city officials have begun to rival or even to dwarf State officials.

CHAPTER XLV

STATE POLITICS

In the last preceding chapters I have attempted to describe first the structure of the machinery of State governments, and then this machinery in motion as well as at rest, — that is to say, the actual working of the various departments in their relations to one another. We may now ask, What is the motive power which sets and keeps these wheels and pistons going? What is the steam that drives the machine?

The States evidently present some singular conditions for the development of a party system. They are self-governing communities with large legislative and administrative powers, existing inside a much greater community of which they are for many purposes independent. They must have parties, and this community, the Federal Union, has also parties. What is the relation of the one set of parties to the other?

There are three kinds of relations possible, viz.: —

Each State might have a party of its own, entirely unconnected with the National parties, but created by State issues — *i.e.* advocating or opposing measures which fall within the exclusive competence of the State.

Each State might have parties which, while based upon State issues, were influenced by the National parties, and in some sort of affiliation with the latter.

The parties in each State might be merely local subdivisions of the National parties, the National issues and organizations swallowing up, or rather pushing aside, the State issues and the organizations formed to deal with them.

The nature of the State governments would lead us to expect to find the first of these relations existing. The sphere of the State is different, some few topics of concurrent jurisdiction excepted, from that of the National government. What the State can deal with, the National government cannot touch. What the National government can deal with lies beyond the

province of the State. The State governor and legislature are elected without relation to the President and Congress, and when elected have nothing to do with those authorities. Hence a question fit to be debated and voted upon in Congress can seldom be a question fit to be also debated and voted upon in a State legislature, and the party formed for advocating its passage through Congress will have no scope for similar action within a State, while on the other hand a State party, seeking to carry some State law, will have no motive for approaching Congress, which can neither help it nor hurt it. The great questions which have divided the Union since its foundation, and on which National parties have been based, have been questions of foreign policy, of the creation of a National bank, of a protective tariff, of the extension of slavery, of the reconstruction of the South after the war. With none of these had a State legislature any title to deal: all lay within the Federal sphere. So at this moment the questions of currency and tariff reform, which are among the most important questions before the country, are outside the province of the State governments. We might therefore expect that the State parties would be as distinct from the National parties as are the State governments from the Federal.

The contrary has happened. The National parties have engulfed the State parties. The latter have disappeared absolutely as independent bodies, and survive merely as branches of the National parties, working each in its own State for the tenets and purposes which a National party professes and seeks to attain. So much is this the case that one may say that a State party has rarely any marked local colour, that it is seldom and then but slightly the result of a compromise between State issues and National issues, such as I have indicated in suggesting the second form of possible relation. The National issues have thrown matters of State competence entirely into the shade, and have done so almost from the foundation of the Republic. The local parties which existed in 1789 in most or all of the States were soon absorbed into the Federalists and Democratic Republicans who sprang into life after the adoption of the Federal Constitution.

The results of this phenomenon have been so important that we may stop to examine its causes.

Within four years from their origin, the strife of the two great National parties became intense over the whole Union. From 1793 till 1815 grave issues of foreign policy, complicated with issues of domestic policy, stirred men to fierce passion and strenuous effort. State business, being more commonplace, exciting less feeling, awakening no interest outside State boundaries, fell into the background. The leaders who won fame and followers were National leaders; and a leader came to care for his influence within his State chiefly as a means of gaining strength in the wider National field. Even so restlessly active and versatile a people as the Americans cannot feel warmly about two sets of diverse interests at the same time, cannot create and work simultaneously two distinct and unconnected party organizations. The State, therefore, had, to use the transatlantic phrase, "to take the back seat." Before 1815 the process was complete; the dividing lines between parties in every State were those drawn by National questions. And from 1827 down to 1877 the renewed keenness of party warfare kept these parties constantly on the stretch, and forced them to use all the support they could win in a State for the purposes of the National struggle.

There was one way in which predominance in a State could be so directly used. The Federal senators are chosen by the State legislatures. The party therefore which gains a majority in the State legislature gains two seats in the smaller and more powerful branch of Congress. As parties in Congress are generally pretty equally balanced, this advantage is well worth fighting for, and is a constant spur to the efforts of National politicians to carry the State elections in a particular State. Besides, in America, above all countries, nothing succeeds like success; and in each State the party which carries the State elections is held likely to carry the elections for the National House of Representatives and for the President also.

Moreover, there are the offices. The Federal offices in each State are very numerous. They are in the gift of whichever National party happens to be in power, *i.e.* counts among its members the President for the time being. He bestows them upon those who in each State have worked hardest for the National party there. Thus the influence of Washington and its presiding deities is everywhere felt, and even the party

which is in a minority in a particular State, and therefore loses its share of the State offices, is cheered and fed by morsels of patronage from the National table. The National parties are in fact all-pervasive, and leave little room for the growth of any other groupings or organizations. A purely State party, indifferent to National issues, would, if it were started now, have no support from outside, would have few posts to bestow, because the State offices are neither numerous nor well paid, could have no pledge of permanence such as the vast mechanism of the National parties provides, would offer little prospect of aiding its leaders to win wealth or fame in the wider theatre of Congress.

Accordingly the National parties have complete possession of the field. In every State from Maine to Texas all State elections for the governorship and other offices are fought on their lines; all State legislatures are divided into members belonging to one or other of them. Every trial of strength in a State election is assumed to presage a similar result in a National election. Every State office is deemed as fitting a reward for services to the National party as for services in State contests. In fact the whole machinery is worked exactly as if the State were merely a subdivision of the Union for electoral purposes. Yet nearly all the questions which come before State legislatures have nothing whatever to do with the tenets of the National parties, while votes of State legislatures, except in respect of the choice of senators, can neither advance nor retard the progress of any cause which lies within the competence of Congress.

How has this system affected the working of the State governments, and especially of their legislatures?

It has prevented the growth within a State of State parties addressing themselves to the questions which belong to its legislature, and really affect its welfare.

The natural source of a party is a common belief, a common aim and purpose. For this men league themselves together, and agree to act in concert. A State party ought therefore to be formed out of persons who desire the State to do something, or not to do it; to pass such and such a law, to grant money to such and such an object. It is, however, formed with reference to no such aim or purpose, but to matters which the State can-

not influence. Hence a singular unreality in the State parties. In most of the legislatures as well as through the electoral districts they cohere very closely. But this cohesion is of no service or significance for nine-tenths of the questions that come before the legislature for its decision, seeing that such questions are not touched by the platform of either party. Party, therefore, does not fulfil its legitimate ends. It does not produce the co-operation of leaders in preparing, of followers in supporting, a measure or line of policy. It does not secure the keen criticism by either side of the measures or policy advocated by the other. It is an artificial aggregation of persons linked together for purposes unconnected with the work they have to do.

This state of things may seem to possess the advantage of permitting questions to be considered on their merits, apart from that spirit of faction which disposes the men on one side to reject a proposal of the other side on the score, not of its demerits, but of the quarter it proceeds from. Such an advantage would certainly exist if members were elected to the State legislatures irrespective of party, if the practice was to look out for good men who would manage State business prudently and pass useful laws. This, however, is not the practice. The strength of the National parties prevents it. Every member is elected as a party man; and the experiment of legislatures working without parties has as little chance of being tried in the several States as in Congress itself. There is yet another benefit which the plan seems to promise. The State legislatures may seem a narrow sphere for an enterprising genius, and their work uninteresting to a superior mind. But if they lead into the larger field of National politics, if distinction in them opens the door to a fame and power extending over the country, able men will seek to enter and to shine in the legislatures of the States. This is the same argument as is used by those who defend the practice, now general in England, of fighting municipal and other local elections on party lines.

It is, however, very doubtful if the American legislatures gain in efficiency by having only party men in them, and whether the elections would be any worse cared for if party was a secondary idea in the voters' minds. Already these

elections are entirely in the hands of party managers, to whom intellect and knowledge do not commend an aspirant, any more than does character. Experience in a State legislature certainly gives a politician good chances of seeing behind the scenes, and makes him familiar with the methods employed by professionals. But it affords few opportunities for distinction in the higher walks of public life, and it is as likely to lower as to raise his aptitude for them. However, a good many men find their way into Congress through the State legislatures — though it is no longer the rule that persons chosen Federal senators by those bodies must have served in them — and perhaps the average capacity of members is kept up by the presence of persons who seek to use the State legislature as a stepping-stone to something further.

It is, however, obviously impossible to treat as party matters many of the questions that come before the legislatures. Local and personal bills, which, it will be remembered, occupy by far the larger part of the time and labours of these bodies, do not fall within party lines at all. The only difference the party system makes to them is that a party leader who takes up such a bill has exceptional facilities for putting it through, and that a district which returns a member belonging to the majority has some advantage when trying to secure a benefit for itself. It is the same with appropriations of State funds to any local purpose. Members use their party influence and party affiliations; but the advocacy of such schemes and opposition to them have comparatively little to do with party divisions, and it constantly happens that men of both parties are found combining to carry some project by which they or their constituents will gain. Of course the less reputable a member is, the more apt will he be to enter into "Rings" which have nothing to do with politics in their proper sense, the more ready to scheme with any trickster, to whichever party he adheres.

Of measures belonging to what may be called genuine legislation, *i.e.* measures for improving the general law and administration of the State, some are so remote from any party issue, and so unlikely to enure to the credit of either party, that they are considered on their merits. A bill, for instance, for improving the State lunatic asylums, or forbidding lotteries,

would have nothing either to hope or fear from party action. It would be introduced by some member who desired reform for its own sake, and would be passed if this member, having convinced the more enlightened among his colleagues that it would do good, or his colleagues generally that the people wished it, could overcome the difficulties which the pressure of a crowd of competing bills is sure to place in its way. Other public measures, however, may excite popular feeling, may be demanded by one class or section of opinion and resisted by another. Bills dealing with the sale of intoxicants, or regulating the hours of labour, or attacking railway companies, or prohibiting the sale of oleomargarine as butter, are matters of such keen interest to some one section of the population, that a party will gain support from many citizens by espousing them, and may possibly estrange others. Hence, though such bills have rarely any connection with the tenets of either party, it is worth the while of a party to win votes by throwing its weight for or against them, according as it judges that there is more to gain by taking the one course or the other.

Is there then no such thing as a real State party, agitating or working solely within State limits, and inscribing on its banner a principle or project which State legislation can advance?

Such a party does sometimes arise. In California, for instance, there has long been strong feeling against the Chinese, and a desire to exclude them. Both Republicans and Democrats were affected by the feeling, and fell in with it. But there sprang up fifteen years ago a third party, which claimed to be specially "anti-Mongolian," while also attacking capitalists and railways; and it lasted for some time, confusing the politics of the State. Questions affecting the canals of the State became at one time a powerful factor in the parties of New York. In Virginia the question of repudiating the State debt gave birth a few years ago to a party which called itself the "Readjusters," and by the help of Negro votes carried the State at several elections. In some of the North-western States the farmers associated themselves in societies called "Granges," purporting to be formed for the promotion of agriculture, and created a Granger party which secured drastic

legislation against the railroad companies and other so-called monopolists. And in most States there now exists an active Prohibitionist party, which agitates for the strengthening and better enforcement of laws restricting or forbidding the sale of intoxicants. It deems itself also a National party, since it has an organization which covers a great part of the Union. But its operations are far more active in the States, because the liquor traffic belongs to State legislation.[1] Since, however, it can rarely secure many members in a State legislature it acts chiefly by influencing the existing parties, and frightening them into pretending to meet its wishes.

All these groups or factions were or are associated on the basis of some doctrine or practical proposal which they put forward. But it sometimes also happens that, without any such basis, a party is formed in a State inside one of the regular National parties; or, in other words, that the National party in the State splits up into two factions, probably more embittered against each other than against the other regular party. Such State factions, for they hardly deserve to be called parties, generally arise from, or soon become coloured by, the rivalries of leaders, each of whom draws a certain numbers of politicians with him.

It will be seen from this fact, as well as from others given in the preceding chapter, that the dignity and magnitude of State politics have declined. They have become more pacific in methods, but less serious and more personal in their aims. In old days the State had real political struggles, in which men sometimes took up arms. There was a rebellion in Massachusetts in 1786–7, which it needed some smart fighting to put down, and another in Rhode Island in 1842, due to the discontent of the masses with the then existing Constitution. The battles of this generation are fought at the polling-booths, though sometimes won in the rooms where the votes are counted by partisan officials. That heads are counted instead of being broken is no doubt an improvement. But these struggles do not always stir the blood of the people as those of the old time did: they seem to evoke less patriotic interest in the State, less public spirit for securing her good govern-

[1] Congress has of course power to impose, and has imposed, an excise upon liquor, but this is far from meeting the demands of the temperance party.

ment. This change does not necessarily indicate a feebler sense of political duty. It is due to that shrivelling up of the State to which I referred in last chapter.

In saying this I do not mean to withdraw or modify what was said, in an earlier chapter, of the greatness of an American State, and the attachment of its inhabitants to it. Those propositions are, I believe, true of a State as compared to any local division of any European country, the cantons of Switzerland excepted. I am here speaking of a State as compared with the nation, and of men's feelings towards their State to-day as compared with the feelings of a century ago. I am, moreover, speaking not so much of sentimental loyalty to the State, considered as a whole, for this is still strong, but of the practical interest taken in its government. Even in Great Britain many a man is proud of his city, of Edinburgh say, or of Manchester, who takes only the slenderest interest in the management of its current business.

We may accordingly say that the average American voter, belonging to the labouring or farming or shopkeeping class, troubles himself little about the conduct of State business. He votes the party ticket at elections as a good party man, and is pleased when his party wins. When a question comes up which interests him, like that of canal management, or the regulation of railway rates, or a limitation of the hours of labour, he is eager to use his vote, and watches what passes in the legislature. He is sometimes excited over a contest for the governorship, and if the candidate of the other party is a stronger and more honest man, may possibly desert his party on that one issue. But in ordinary times he follows the proceedings of the legislature so little that an American humourist, describing the initial stages of dotage, observes that the poor old man took to filing the reports of the debates in his State legislature. The politics which the voter reads by preference are National politics; and especially whatever touches the next presidential election. In State contests that which chiefly fixes his attention is the influence of a State victory on an approaching National contest.

The more educated and thoughtful citizen, especially in great States like New York and Pennsylvania, is apt to be disgusted by the sordidness of many State politicians and the pettiness

of most. He regards Albany and Harrisburg much as he regards a wasp's nest in one of the trees of his suburban garden. The insects eat his fruit, and may sting his children; but it is too much trouble to set up a ladder and try to reach them. Some public-spirited young men have, however, occasionally thrown themselves into the muddy whirlpool of the New York legislature, chiefly for the sake of carrying Acts for the better government of cities. When the tenacity of such men proves equal to their courage, they gain in time the active support of those who have hitherto stood aloof, regarding State politics as a squabble over offices and jobs. By the help of the press they are sometimes able to carry measures such as an improved Ballot Act, or an act for checking expenditure at elections, which is not only valuable in their own State but sets an example which other States are apt to follow.

A European observer, sympathetic with the aims of the reformers, is inclined to think that the battle for honest government ought to be fought everywhere, in State legislatures and city councils as well as in the National elections and in the press, and is at first surprised that so much effort should be needed to secure what all good citizens, to whichever party they belong, might be expected to work for. But he would be indeed a self-confident European who should fancy he had discovered anything which had not already occurred to his shrewd American friends; and the longer such an observer studies the problem, the better does he learn to appreciate the difficulties which the system of party organization throws in the way of all reforming efforts.

CHAPTER XLVI

THE TERRITORIES

Of the 3,501,404 square miles which constitute the area of the United States, 2,667,535 are included within the bounds of the forty-five States whose government has been described in the last preceding chapters. The 833,899 square miles which remain fall into the three following divisions: —

	Sq. Miles.
Three organized Territories, viz.: —	
Arizona, New Mexico, Oklahoma	274,630
Two unorganized Territories, viz.: —	
Alaska	531,409
Indian Territory, west of Arkansas	31,400
The Federal District of Columbia	70

Of these the three latter may be dismissed in a word or two. The District of Columbia is a piece of land set apart to contain the city of Washington, which is the seat of the Federal government. It is governed by three commissioners appointed by the President, and has no local legislature nor municipal government, the only legislative authority being Congress.

Alaska (population in 1890, 31,795, of whom 4303 were whites and 23,274 Indians) and the Indian Territory are also under the direct authority of officers appointed by the President and of laws passed by Congress. Both are chiefly inhabited by Indian tribes, some of which, however, in the Indian Territory, and particularly the Cherokees, have made considerable progress in civilization.[1] Neither region is

[1] There are five civilized tribes in this Territory, Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles. "Each tribe manages its own affairs under a Constitution modelled upon that of the United States. Each has a common school system, including schools for advanced instruction, all supported by the Indians themselves. The agent of the National Indian Defence Association says that there is not in the Cherokee Nation a single Indian of either sex over fifteen years of age who cannot read or write." — *Report of the U. S. Commissioner of Education*, 1886. The census of 1890 gives the total numbers of these tribes at 66,289, of whom 52,065 are pure Indians. The total number of Indians in the United States (excluding Alaska) is returned at 249,273.

likely for a long time to come to receive regular political institutions.

Until 1889, the organized Territories, eight in number, formed a broad belt of country extending from Canada on the north to Mexico on the south, and separating the States of the Mississippi valley from those of the Pacific slope. In that year Congress passed acts under which three of them, Dakota (which divided itself into North Dakota and South Dakota), Montana, and Washington became entitled to be admitted as States; while in 1890 two others (Idaho and Wyoming) and in 1894 Utah also were similarly permitted to become States. These have now (1896) enacted constitutions and thereby organized themselves as States. They are the seven States of North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming, and Utah. To the two remaining Territories one has been added by the carving out of Oklahoma, in 1890, from the Indian Territory. These three require some description, because they present an interesting form of autonomy or local self-government, differing from that which exists in the several States, and in some points more akin to that of the self-governing colonies of Great Britain. This form has in each Territory been created by Federal statutes, beginning with the great ordinance for the government of the Territory of the United States north-west of the river Ohio, passed by the Congress of the Confederation in 1787. Since that year many Territories have been organized, by different statutes and on different plans, out of the western dominions of the United States, under the general power conferred upon Congress by the Federal Constitution (Art. iv. § 3); and all but the above-mentioned three have now become States. At first local legislative power was vested in the governor and the judges; it is now exercised by an elective legislature. The present organization of the three that remain is in most respects identical; and in describing it I shall ignore minor differences.

The fundamental law of every Territory, as of every State, is the Federal Constitution; but whereas every State has also its own popularly enacted State constitution, the Territories are not regulated by any similar instruments, which for them are replaced by the Federal statutes establishing their government and prescribing its form. However, some Territories

have created a sort of rudimentary constitution by enacting a Bill of Rights.

In every Territory, as in every State, the executive, legislative, and judicial departments are kept distinct. The executive consists of a governor appointed for four years by the President of the United States, with the consent of the Senate, and removable by the President, together with a secretary, treasurer, auditor, and usually also a superintendent of public instruction and a librarian. The governor commands the militia, and has a veto upon the acts of the legislature, which, however, may (except in Arizona) be overridden by a two-thirds majority in each house. He is responsible to the Federal government, and reports yearly to the President on the condition of the Territory, often making his report a sort of prospectus in which the advantages which his dominions offer to intending immigrants are fondly set forth. He also sends a message to the legislature at the beginning of each session. Important as the post of governor is, it is often bestowed as a mere piece of party patronage, with no great regard to the fitness of the appointee.

The legislature is composed of two Houses, a Council of twelve (in Oklahoma thirteen) persons, and a House of Representatives of twenty-four (in Oklahoma twenty-six) persons, elected by districts. Each is elected by the voters of the Territory for two years, and sits only once in that period. The session is limited (by Federal statutes) to sixty days, and the salary of a member is $4 per day. The Houses work much like those in the States, doing the bulk of their business by standing committees, and frequently suspending their rules to run measures through with little or no debate. The electoral franchise is left to be fixed by Territorial statute, but Federal statutes prescribe that every member shall be resident in the district he represents. The sphere of legislation allowed to the legislature is wide, indeed practically as wide as that enjoyed by the legislature of a State, but subject to certain Federal restrictions. It is subject also to the still more important right of Congress to annul or modify by its own statutes any Territorial act. In some Territories every act was directed to be submitted to Congress for its approval, and, if disapproved, to be of no effect; in others submission has not been

required. But in all Congress may exercise without stint its power to override the statutes passed by a Territorial legislature.

The judiciary consists of three or more judges of a Supreme Court, appointed for four years by the President, with the consent of the Senate (salary $3000), together with a United States district attorney and a United States marshal. The law they administer is partly Federal, all Federal statutes being construed to take effect, where properly applicable, in the Territories, partly local, created in each Territory by its own statutes; and appeals, where the sum in dispute is above a certain value, go to the Supreme Federal Court. Although these courts are created by Congress in pursuance of its general sovereignty — they do not fall within the provisions of the Constitution for a Federal judiciary — the Territorial legislature is allowed to regulate their practice and procedure. The expenses of Territorial governments are borne by the Federal Treasury.

The Territories send neither senators nor representatives to Congress, nor do they take part in presidential elections. The House of Representatives, under a statute, admits a delegate from each of them to sit and speak, but of course not to vote, because the right of voting in Congress depends on the Federal Constitution. The position of a citizen in a Territory is therefore a peculiar one. What may be called his private or passive citizenship is complete: he has all the immunities and benefits which any other American citizen enjoys. But the public or active side is wanting, so far as the National government is concerned, although complete for local purposes. It may seem inconsistent with principle that citizens should be taxed by a government in whose legislature they are not represented; but the practical objections to giving the full rights of States to these comparatively rude communities outweigh any such theoretical difficulties.

It must moreover be remembered that a Territory, which may be called an inchoate or rudimentary State, looks forward to become a complete State. When its population becomes equal to that of an average congressional district, its claim to be admitted as a State is strong, and in the absence of specific objections will be granted. Congress, however, has absolute

discretion in the matter, and often uses its discretion under the influence of partisan motives. Nevada was admitted to be a State when its population was only about 20,000, mainly for the sake of getting its vote for the thirteenth constitutional amendment. It subsequently rose to 62,266, but has now declined to 45,761. When Congress resolves to turn a Territory into a State, it either (as happened in the cases of Idaho and Wyoming) passes an act accepting and ratifying a constitution already made for themselves by the people, and forthwith admitting the community as a State, or else passes what is called an Enabling Act, under which the inhabitants elect a constitutional convention, empowered to frame a draft constitution. When this constitution has been submitted to and accepted by the voters of the Territory, the act of Congress takes effect: the Territory is transformed into a State, and proceeds to send its senators and representatives to Congress in the usual way. The Enabling Act may prescribe conditions to be fulfilled by the State Constitution, but has not usually attempted to narrow the right which the citizens of the newly formed State will enjoy of subsequently modifying that instrument in any way not inconsistent with the provisions of the Federal Constitution. However, in the case of the Dakotas, Montana, Washington, Idaho, and Wyoming, the Enabling Act required the conventions to make "by ordinance irrevocable without the consent of the United States and the people of the said States" certain provisions, including one for perfect religious toleration and another for the maintenance of public schools free from sectarian control. This the six States have done accordingly. But whether this requirement of the consent of Congress would be held binding if the people of the State should hereafter repeal the ordinance, may be doubted.

The arrangements above described seem to work well. Self-government is practically enjoyed by the Territories, despite the supreme authority of Congress, just as it is enjoyed by Canada and the Australasian colonies of Great Britain despite the legal right of the British Parliament to legislate for every part of the Queen's dominions. The want of a voice in Congress and in presidential elections, and the fact that the governor is set over them by an external power, are not felt to be practical grievances, partly of course because these young com-

munities are too small and too much absorbed in the work of developing their natural resources to be keenly interested in National politics. Their local political life much resembles that of the newer Western States. Both Democrats and Republicans have their regular party organizations, but the business of a Territorial legislature gives little opportunity for any real political controversies, though abundant opportunities for local jobbing.

CHAPTER XLVII

LOCAL GOVERNMENT

Every State in the Union has its own system of local areas and authorities, created and worked under its own laws; and though these systems agree in many points, they differ in so many others, that a whole volume would be needed to give even a summary view of their peculiarities. All I can here attempt is to distinguish the leading types of local government to be found in the United States, to describe the prominent features of each type, and to explain the influence which the large scope and popular character of local administration exercise upon the general life and well-being of the American people.

Three types of rural local government are discernible in America. The first is characterized by its unit, the town or township, and exists in the six New England States. The second is characterized by a much larger unit, the county, and prevails in the Southern States. The third combines some features of the first with some of the second, and may be called the mixed system. It is found, under a considerable variety of forms, in the Middle and North-western States. The differences of these three types are interesting, not only because of the practical instruction they afford, but also because they spring from original differences in the character of the colonists who settled along the American coast, and in the conditions under which the communities there founded were developed.

The first New England settlers were Puritans in religion, and sometimes inclined to republicanism in politics. They were largely townsfolk, accustomed to municipal life and to vestry meetings. They planted their tiny communities along the seashore and the banks of rivers, enclosing them with stockades for protection against the warlike Indians. Each

was obliged to be self-sufficing, because divided by rocks and woods from the others. Each had its common pasture on which the inhabitants turned out their cattle, and which officers were elected to manage. Each was a religious as well as a civil body politic, gathered round the church as its centre; and the equality which prevailed in the congregation prevailed also in civil affairs, the whole community meeting under a president or moderator to discuss affairs of common interest. Each such settlement was called a town, or township, and was in fact a miniature commonwealth, exercising a practical sovereignty over the property and persons of its members — for there was as yet no State, and the distant home government scarcely cared to interfere — but exercising it on thoroughly democratic principles. Its centre was a group of dwellings, often surrounded by a fence or wall, but it included a rural area of several square miles, over which farmhouses and clusters of houses began to spring up when the Indians retired. The name "town" covered the whole of this area, which was never too large for all the inhabitants to come together to a central place of meeting. This town organization remained strong and close, the colonists being men of narrow means, and held together in each settlement by the needs of defence. And though presently the towns became aggregated into counties, and the legislature and governor, first of the whole colony, and, after 1776, of the State, began to exert their superior authority, the towns held their ground, and are to this day the true units of political life in New England, the solid foundation of that well-compacted structure of self-government which European philosophers have admired and the new States of the West have sought to reproduce. Till 1821 the towns were the only political corporate bodies in Massachusetts, and till 1857 they formed, as they still form in Connecticut, the basis of representation in her Assembly, each town, however small, returning at least one member. Not a little of that robust, if somewhat narrow, localism which characterizes the representative system of America is due to this originally distinct and self-sufficing corporate life of the seventeenth century towns.

Very different were the circumstances of the Southern colonies. The men who went to Virginia and the Carolinas were

not Puritans, nor did they mostly go in families and groups of families from the same neighbourhood. Many were casual adventurers, often belonging to the upper class, Episcopalians in religion, and with no such experience of, or attachment to, local self-government as the men of Massachusetts or Connecticut. They settled in a region where the Indian tribes were comparatively peaceable, and where therefore there was little need of concentration for the purposes of defence. The climate along the coast was somewhat too hot for European labour, so slaves were imported to cultivate the land. Population was thinly scattered; estates were large; the soil was fertile and soon enriched its owners. Thus a semi-feudal society grew up, in which authority naturally fell to the landowners, each of whom was the centre of a group of free dependants as well as the master of an increasing crowd of slaves. There were therefore comparatively few urban communities, and the life of the colony took a rural type. The houses of the planters lay miles apart from one another; and when local divisions had to be created, these were made large enough to include a considerable area of territory and number of land-owning gentlemen. They were therefore rural divisions, counties framed on the model of English counties. Smaller circumscriptions there were, such as hundreds and parishes, but the hundred died out, the parish ultimately became a purely ecclesiastical division, and the parish vestry was restricted to ecclesiastical functions, while the county remained the practically important unit of local administration, the unit to which the various functions of government were aggregated, and which, itself controlling minor authorities, was controlled by the State government alone.

The affairs of the county were usually managed by a board of elective commissioners, and not, like those of the New England towns, by a primary assembly; and in an aristocratic society the leading planters had of course a predominating influence. Hence this form of local government was not only less democratic, but less stimulating and educative than that which prevailed in the New England States. Nor was the Virginian county, though so much larger than the New England town, ever as important an organism over against the State. It may almost be said, that while a New England State is a

combination of towns, a Southern State is from the first an administrative as well as political whole, whose subdivisions, the counties, had never any truly independent life, but were and are mere subdivisions for the convenient despatch of judicial and financial business.

In the Middle States of the Union, Pennsylvania, New Jersey, and New York, settled or conquered by Englishmen some time later than New England, the town and town meeting did not as a rule exist, and the county was the original basis of organization. But as there grew up no planting aristocracy like that of Virginia or the Carolinas, the course of events took in the Middle States a different direction. As trade and manufactures grew, population became denser than in the South. New England influenced them, and influenced still more the newer commonwealths which arose in the North-west, such as Ohio and Michigan, into which the surplus population of the East poured. And the result of this influence is seen in the growth through the Middle and Western States of a mixed system, which presents a sort of compromise between the county system of the South and the town system of the North-east. There are great differences between the arrangements in one or other of these Middle and Western States. But it may be said, speaking generally, that in them the county is relatively less important than in the Southern States, the township less important than in New England. The county is perhaps to be regarded, at least in New York, Pennsylvania, and Ohio, as the true unit, and the townships (for so they are usually called) as its subdivisions. But the townships are vigorous organisms, which largely restrict the functions of the county authority, and give to local government, especially in the North-west, a character generally similar to that which it wears in New England.

The town is in rural districts the smallest local circumscription. English readers must be reminded that it is a rural, not an urban community, and that the largest group of houses it contains may be only what would be called in England a hamlet or small village. Its area seldom exceeds five square miles; its population is usually small, averaging less than 3000, but occasionally ranges up to 13,000, and sometimes falls below 200. It is governed by an assembly

of all qualified voters resident within its limits, which meets at least once a year, in the spring, and from time to time as summoned. There are usually three or four meetings each year. Notice is required to be given at least ten days previously, not only of the hour and place of meeting, but of the business to be brought forward. This assembly has the power both of electing officials and of legislating. It chooses the selectmen, school committee, and executive officers for the coming year; it enacts by-laws and ordinances for the regulation of all local affairs; it receives the reports of the selectmen and the several committees, passes their accounts, hears what sums they propose to raise for the expenses of next year, and votes the necessary taxation accordingly, appropriating to the various local purposes — schools, aid to the poor, the repair of highways, and so forth — the sums directed to be levied. Its powers cover the management of the town lands and other property, and all local matters whatsoever, including police and sanitation. Every resident has the right to make, and to support by speech, any proposal. The meeting, which is presided over by a chairman called the moderator — a name recalling the ecclesiastical assemblies of the English commonwealth — is held in the town hall, if the town possesses one, or in the principal church or schoolhouse, but sometimes in the open air. The attendance is usually good; the debates sensible and practical. Much of course depends on the character and size of the population. Where it is of native American stock, and the number of voting citizens is not too great for thorough and calm discussion, no better school of politics can be imagined, nor any method of managing local affairs more certain to prevent jobbery and waste, to stimulate vigilance and breed contentment. When, however, the town meeting has grown to exceed seven or eight hundred persons, where the element of farmers has been replaced by that of factory operatives, and still more when any considerable section are strangers, such as the Irish or French Canadians who have latterly poured into New England, the institution works less perfectly, because the multitude is too large for debate, factions are likely to spring up, and the new immigrants, untrained in self-government, become the prey of wirepullers or petty demagogues. The social conditions of to-day in New

England are less favourable than those which gave birth to it; and there are now in the populous manufacturing States of Massachusetts, Rhode Island, and Connecticut comparatively few purely rural towns, such as those which suggested the famous eulogium of Jefferson, who eighty years ago desired to see the system transplanted to his own Virginia: —

"Those wards called townships in New England are the vital principle of their governments, and have proved themselves the wisest invention ever devised by the wit of man for the perfect exercise of self-government, and for its preservation. . . . As Cato, then, concluded every speech with the words '*Carthago delenda est*,' so do I every opinion with the injunction, 'Divide the counties into wards.'"

The executive of a town consists of the selectmen, from three to nine in number, usually either three, five, or seven. They are elected annually, and manage all the ordinary business, of course under the directions given them by the last preceding meeting. There is also a town clerk, who keeps the records, and minutes the proceedings of the meeting, and is generally also registrar of births and deaths; a treasurer; assessors, who make a valuation of property within the town for the purposes of taxation; the collector, who gathers the taxes, and divers minor officers, such as hog-reeves (now usually called field drivers), cemetery trustees, library trustees, and so forth, according to local needs. There is always a school committee, with sometimes sub-committees for minor school districts if the town be a large one. Some of these officers and committees are paid (the selectmen usually), some unpaid, though allowed to charge their expenses actually incurred in town work; and there has generally been no difficulty in getting respectable and competent men to undertake the duties. Town elections are not professedly political, *i.e.* they are not usually fought on party lines, though occasionally party spirit affects them, and a man prominent in his party is more likely to obtain support.

Next above the town stands the county. Its area and population vary a good deal. It was originally an aggregation of towns for judicial purposes, and is still in the main a judicial district in and for which civil and criminal courts are held, some by county judges, some by State judges, and in and for

which certain judicial officers are elected by the people at the polls, who also choose a sheriff and a clerk. Police belongs to the towns and cities, not to the county within which they lie. The chief administrative officers are the county commissioners and county treasurer. They are salaried officers, and have the management of county buildings, such as court-houses and prisons, with power to lay out new highways from town to town, to grant licences, estimate the amount of taxation needed to defray county charges, and apportion the county tax among the towns and cities by whom it is to be levied. But except in this last-mentioned respect the county authority has no power over the towns, and it will be perceived that while the county commissioners are controlled by the legislature, being limited by statute to certain well-defined administrative functions, there exists nothing in the nature of a county council or other assembly with legislative functions. The functions of the county are in fact of small consequence: it is a judicial district and a highway district and little more.

The system which prevails in the Southern States need not long detain us, for it is less instructive and has proved less successful. Here the unit is the county, except in Louisiana, where the equivalent division is called a parish. The county was originally a judicial division, established for the purposes of local courts, and a financial one, for the collection of State taxes. It has now, however, generally received some other functions, such as the superintendence of public schools, the care of the poor, and the management of roads. In the South counties are larger than in New England, but not more populous, for the country is thinly peopled. The county officers, whose titles and powers vary somewhat in different States, are usually the board or court of county commissioners, an assessor (who prepares the valuation), a collector (who gathers the taxes), a treasurer, a superintendent of education, an overseer of roads — all of course salaried, and now, as a rule, elected by the people, mostly for one or two years. These county officers have, besides the functions indicated by their names, the charge of the police and the poor of the county, and of the construction of public works, such as bridges and prisons. The county judges and the sheriff, and frequently

the coroner, are also chosen by the people. The sheriff is everywhere in America the chief executive officer attached to the judicial machinery of the county.

In these Southern States there exist various local divisions smaller than the counties. Their names and their attributions vary from State to State, but they have no legislative authority like that of the town meeting of New England, and their officers have very limited powers, being for most purposes controlled by the county authorities. The most important local body is the school committee for each school district. In several States, such as Virginia and North Carolina, we now find townships, and the present tendency seems in these States to be towards the development of something resembling the New England town. It is a tendency which grows with the growth of population, with the progress of manufactures and of the middle and industrious working class occupied therein, and especially with the increased desire for education. The school, some one truly says, is becoming the nucleus of local self-government in the South now, as the church was in New England two centuries ago. Nowhere, however, has there appeared a primary assembly; while the representative local assembly is still in its infancy. Local authorities in the South, and in the States which, like Nevada and Oregon, may be said to have adopted the county system, are generally executive officers and nothing more.

The third type is less easy to characterize than either of the two preceding, and the forms under which it appears in the Middle and North-western States are even more various than those referable to the second type. Two features mark it. One is the importance and power of the county, which in the history of most of these States appears before any smaller division; the other is the activity of the township,[1] which has more independence and a larger range of competence than under the system of the South. Now of these two features the former is the more conspicuous in one group of States — Pennsylvania, New Jersey, New York, Ohio, Indiana, Iowa; the latter in another group — Michigan, Illinois, Wisconsin, Minnesota, the two Dakotas, the reason being that the New

[1] Township is the term most frequently used outside New England: town in New England.

Englanders, who were often the largest and always the most intelligent and energetic element among the settlers in the more northern of these two State groups, carried with them their attachment to the town system and their sense of its value, and succeeded, though sometimes not without a struggle, in establishing it in the six great and prosperous commonwealths which form that group. On the other hand, while Pennsylvania, New Jersey, and New York had not (from the causes already stated) started with the town system, they never adopted it completely; while in Ohio and Indiana the influx of settlers from the slave States, as well as from New York and Pennsylvania, gave to the county an early preponderance, which it has since retained. The conflict of the New England element with the Southern element is best seen in Illinois, the northern half of which State was settled by men of New England blood, the southern half by pioneers from Kentucky and Tennessee. The latter, coming first, established the county system, but the New Englanders fought against it, and in the constitutional convention of 1848 carried a provision, embodied in the Constitution of that year, and repeated in the present Constitution of 1870, whereby any county may adopt a system of township organization "whenever the majority of the legal voters of the county voting at any general election shall so determine." Under this power four-fifths of the 102 counties have now adopted the township system.

The conspicuous feature of this system is the reappearance of the New England town meeting, though in a somewhat less primitive and at the same time less perfect form, because the township of the West is a more artificial organism than the rural town of Massachusetts or Rhode Island, where, until lately, everybody was of English blood, everybody knew everybody else, everybody was educated not only in book-learning, but in the traditions of self-government. However, such as it is, the Illinois and Michigan system is spreading.

In proportion to the extent in which a State has adopted the township system the county has tended to decline in importance. It is nevertheless of more consequence in the West than in New England. It has frequently an educational official who inspects the schools, and it raises a tax for aiding

schools in the poorer townships. It has duties, which are naturally more important in a new than in an old State, of laying out main roads and erecting bridges and other public works. And sometimes it has the oversight of township expenditure. The board of county commissioners consists in Michigan and Illinois of the supervisors of all the townships within the county; in Wisconsin and Minnesota the commissioners are directly chosen at a county election.

I pass to the mixed or compromise system as it appears in the other group of States, of which Pennsylvania, Ohio, Indiana, and Iowa may be taken as samples. In these States we find no town meeting. Their township may have greater or less power, but its members do not come together in a primary assembly; it elects its local officers, and acts only through and by them. In Ohio there are three township trustees with the entire charge of local affairs, a clerk and a treasurer. In Pennsylvania the township is governed by two or three supervisors, elected for three years, one each year, together with an assessor (for valuation purposes), a town clerk, three auditors, six school directors, elected for three years, two each year; and (where the poor are a township charge) two overseers of the poor. The supervisors may lay a rate on the township not exceeding one per cent on the valuation of the property within its limits for the repair of roads, highways, and bridges, and the overseers of the poor may, with the consent of two justices, levy a similar tax for the poor. But as the poor are usually a county charge, and as any ratepayer may work out his road tax in labour, township rates amount to very little.

CHAPTER XLVIII

OBSERVATIONS ON LOCAL GOVERNMENT

The chief functions local government has to discharge in the United States may be summarized in a few paragraphs: —

Making and repairing Roads and Bridges. — These prime necessities of rural life are provided for by the township, county, or State, according to the class to which a road or bridge belongs. That the roads of America are proverbially ill-built and ill-kept is due partly to the climate, with its alternations of severe frost, occasional torrential rains (in the Middle and Southern States), and long droughts; partly to the hasty habits of the people, who are too busy with other things, and too eager to use their capital in private enterprises to be willing to spend freely on highways; partly also to the thinness of population, which is, except in a few manufacturing districts, much less dense than in Western Europe. In many districts railways have come before roads, so roads have been the less used and cared for.

The administration of justice was one of the first needs which caused the formation of the county: and matters connected with it still form a large part of county business. The voters elect a judge or judges, and the local prosecuting officer, called the district attorney, and the chief executive officer, the sheriff. Prisons are a matter of county concern. Police is always locally regulated, but in the Northern States more usually by the township than by the county. However, this branch of government, so momentous in continental Europe, is in America comparatively unimportant outside the cities. The rural districts get on nearly everywhere with no guardians of the peace, beyond the township constable; nor does the State government, except, of course, through statutes, exercise any control over local police administration. In the rural parts of the Eastern and Middle States property is as safe as any-

where in the world. In such parts of the West as are disturbed by dacoits, or by solitary highwaymen, travellers defend themselves, and, if the sheriff is distant or slack, lynch law may usefully be invoked. The care of the poor is thrown almost everywhere upon local and not upon State authorities, and defrayed out of local funds, sometimes by the county, sometimes by the township. The poor laws of the several States differ in so many particulars that it is impossible to give even an outline of them here. Little out-door relief is given, though in most States the relieving authority may, at his or their discretion, bestow it; and pauperism is not, and has never been, a serious malady, except in some five or six great cities, where it is now vigorously combated by volunteer organizations largely composed of ladies. The total number of persons returned as almshouse-paupers in the whole Union in 1890 was 73,045. Adding 25,000 for persons in receipt of out-door relief, we have a proportion of 1 to 652 of the whole population.

To education I can refer only in passing, because the differences between the arrangements of the several States are too numerous to be described here. It has hitherto been not only a more distinctively local matter, but one relatively far more important than in most parts of Europe. And there is usually a special administrative body, often a special administrative area, created for its purposes — the school committee and the school district. The vast sum expended on public instruction has been already mentioned. Though primarily dealt with by the smallest local circumscription, there is a growing tendency for both the county and the State to interest themselves in the work of instruction by way of inspection, and to some extent of pecuniary subventions. Not only does the county often appoint a county superintendent, but there are in some States county high schools and (in most) county boards of education, besides a State board of commissioners. I need hardly add that the schools of all grades are more numerous and efficient in the Northern and Western than in the Southern States. In old colonial days, when the English commissioners for foreign plantations asked for information on the subject of education from the governors of Virginia and Connecticut, the former replied, "I thank God there are no free schools or printing presses, and I hope

we shall not have any these hundred years;" and the latter, "One-fourth of the annual revenue of the colony is laid out in maintaining free schools for the education of our children." The disparity was prolonged and intensified in the South by the existence of slavery. Now that slavery has gone, the South makes rapid advances; but the proportion of illiteracy, especially of course among the Negroes, is still high.

The apparent complexity of the system of local government sketched in the last preceding chapter is due entirely to the variations between the several States. In each State it is eminently simple. There are few local divisions, few authorities; the divisions and authorities rarely overlap. No third local area and local authority intermediate between township and county has been found necessary. Especially simple is the method of levying taxes. In most States a citizen pays at the same time, to the same officer, upon the same paper of demand, all his local taxes, and not only these, but also his State tax; in fact, all the direct taxes which he is required to pay. The State is spared the expense of maintaining a separate collecting staff, for it leans upon and uses the local officials who do the purely local work. The tax-payer has not the worry of repeated calls upon his check-book. Nor is this simplicity and activity of local administration due to its undertaking fewer duties, as compared with the State, than is the case in Europe. On the contrary, the sphere of local government is in America unusually wide, and widest in what may be called the most characteristically American and democratic regions, New England and the North-west. Americans often reply to the criticisms which Europeans pass on the faults of their State legislatures and the shortcomings of Congress by pointing to the healthy efficiency of their rural administration, which enables them to bear with composure the defects of the higher organs of government, defects which would be less tolerable in a centralized country, where the National government deals directly with local affairs, or where local authorities await an initiative from above.

Of the three or four types or systems of local government which I have described, that of the town or township with its popular primary assembly is admittedly the best. It is the cheapest and the most efficient; it is the most educative to the

citizens who bear a part in it. The town meeting has been not only the source but the school of democracy.[1] The action of so small a unit needs, however, to be supplemented, perhaps also in some points supervised, by that of the county, and in this respect the mixed system of the Middle States is deemed to have borne its part in the creation of a perfect type. For some time past an assimilative process has been going on over the United States tending to the evolution of such a type. In adopting the township system of New England, the Northwestern States have borrowed some of the attributes of the Middle States county system. The Middle States have developed the township into a higher vitality than it formerly possessed there. Some of the Southern States are introducing the township, and others are likely to follow as they advance in population and education. It is possible that by the middle of next century there will prevail one system, uniform in its outlines over the whole country, with the township for its basis, and the county as the organ called to deal with those matters which, while they are too large for township management, it seems inexpedient to remit to the unhealthy atmosphere of a State capital.

[1] In Rhode Island it was the towns that made the State.

CHAPTER XLIX

THE GOVERNMENT OF CITIES

The growth of great cities has been among the most significant and least fortunate changes in the character of the population of the United States during the century that has passed since 1787. The census of 1790 showed only six cities with more than 8000, and only one with more than 40,000 inhabitants. In 1880 there were 286 exceeding 8000, 40 exceeding 40,000, 20 exceeding 100,000; while the census of 1890 showed 443 exceeding 8000, 74 exceeding 40,000, 28 exceeding 100,000. The ratio of persons living in cities exceeding 8000 inhabitants to the total population was, in 1790, 3.35 per cent, in 1840, 8.52, in 1880, 22.57, in 1890, 29.12. And this change has gone on with accelerated speed notwithstanding the enormous extension of settlement over the vast regions of the West. Needless to say that a still larger and increasing proportion of the wealth of the country is gathered into the larger cities. Their government is therefore a matter of high concern to America, and one which cannot be omitted from a discussion of transatlantic politics.

We find in all the larger cities —

A mayor, head of the executive, and elected directly by the voters within the city.

Certain executive officers or boards, some directly elected by the city voters, others nominated by the mayor or chosen by the city legislature.

A legislature, consisting usually of two, but sometimes of one chamber, directly elected by the city voters.

Judges, usually elected by the city voters, but sometimes appointed by the State.

What is this but the frame of a State government applied to the smaller area of a city? The mayor corresponds to the governor, the officers or boards to the various State officials

and boards elected, in most cases, by the people; the aldermen and common council (as they are generally called) to the State Senate and Assembly; the city elective judiciary to the State elective judiciary.

The mayor is by far the most conspicuous figure in city governments. He holds office, sometimes for one year, but now more frequently for two, three, or even five years. In some cities he is not re-eligible. He is directly elected by the people of the whole city, and is usually not a member of the city legislature. He has, almost everywhere, a veto on all ordinances passed by that legislature, which, however, can be overridden by a two-thirds majority. In many cities he appoints some among the heads of departments and administrative boards, though usually the approval of the legislature or of one branch of it is required. Quite recently some city charters have gone so far as to make him generally responsible for all the departments (subject to the control of supply by the legislative body), and therewith liable to impeachment for misfeasance. He receives a considerable salary, varying with the size of the city, but sometimes reaching $10,000, the same salary as that allotted to the justices of the Supreme Federal Court. It rests with him, as the chief executive officer, to provide for the public peace, to quell riots, and, if necessary, to call out the militia. He often exerts, in practice, some discretion as to the enforcement of the law; he may, for instance, put in force Sunday Closing Acts or regulations, or omit to do so.

The practical work of administration is carried on by a number of departments, sometimes under one head, sometimes constituted as boards or commissions. The most important of these are directly elected by the people, for a term of one, two, three, or four years. Some, however, are chosen by the city legislature, some by the mayor with the approval of the legislature or its upper chamber. In most cities the chief executive officers have been disconnected from one another, owing no common allegiance, except that which their financial dependence on the city legislature involves, and communicating less with the city legislature as a whole than with its committees, each charged with some one branch of administration, and each apt to job it.

Education has been generally treated as a distinct matter,

with which neither the mayor nor the city legislature has been suffered to meddle. It is committed to a board of education, whose members are separately elected by the people, or, as in Brooklyn, appointed by the mayor, and who levy (though they do not themselves collect) a separate tax, and have an executive staff of their own at their disposal.

The city legislature usually consists in small cities of one chamber, in large ones of two, the upper of which generally bears the name of the board of aldermen, the lower that of the common council.[1] All are elected by the citizens, generally in wards, but the upper house occasionally by districts or on what is called a "general ticket," *i.e.* a vote over the whole city.[2] Usually the common council is elected for one year, or at most for two years, the upper chamber frequently for a longer period.[3] Both are usually unpaid in the smaller cities, sometimes paid in the larger.[4] All city legislation, that is to say, ordinances, by-laws, and votes of money from the city treasury, are passed by the council or councils, subject in many cases to the mayor's veto. Except in a few cities governed by very recent charters, the councils have some control over at least the minor officials. Such control is exercised by committees, a method borrowed from the State and National legislatures, and suggested by the same reasons of convenience which have established it there, but proved by experience to have the evils of secrecy and irresponsibility as well as that of disconnecting the departments from one another.

The city judges are only in so far a part of the municipal

[1] Some large cities, however (*e.g.* New York and Brooklyn, Chicago with its 36 aldermen, San Francisco with its 12 supervisors), have only one chamber.

[2] In some few cities, among which are Chicago and (as respects police magistrates and school directors) Philadelphia, the plan of minority representation has been to some extent adopted by allowing the voter to cast his vote for two candidates only when there are three places to be filled. It was tried in New York, but the State Court of Appeals held it unconstitutional. So far as I can ascertain, this method has in Philadelphia proved rather favourable than otherwise to the "machine politicians," who can rely on their masses of drilled voters.

[3] Sometimes the councilman is required by statute to be a resident in the ward he represents.

[4] Boston and Cincinnati give no salary, St. Louis pays members of both its councils $300 a year, Baltimore, $1000. New York pays and Brooklyn does not. The Municipal (Reform) League of Philadelphia advocate the payment of councilmen.

government that in most of the larger cities they are elected by the citizens, like the other chief officers. There are usually several superior judges, chosen for terms of five years and upwards, and a larger number of police justices,[1] generally for shorter terms. Occasionally, however, the State has prudently reserved to itself the appointment of judges.

The election of the above officers is usually made to coincide with that of State officers, perhaps also of Federal congressmen. This saves expense and trouble. But as it not only bewilders the voter in his choice of men by distracting his attention between a large number of candidates and places, but also confirms the tendency, already strong, to vote for city officers on party lines, there has of late years been a movement in some places to have the municipal elections fixed for a different date from that of State or Federal elections, so that the undistracted and non-partisan thought of the citizens may be given to the former.

At present the disposition to run and vote for candidates according to party is practically universal, although the duty of party loyalty is deemed less binding than in State or Federal elections. When both the great parties put forward questionable men, a non-partisan list, or so-called "citizens' ticket," may be run by a combination of respectable men of both parties. Sometimes this attempt succeeds. However, though the tenets of Republicans and Democrats have absolutely nothing to do with the conduct of city affairs, though the sole object of the election, say of a city comptroller or auditor, may be to find an honest man of good business habits, four-fifths of the electors in nearly all cities give little thought to the personal qualifications of the candidates, and vote the "straight out ticket."

The functions of city government may be distributed into three groups — (*a*) those which are delegated by the State out of its general coercive and administrative powers, including the police power, the granting of licences, the execution of laws relating to adulteration and explosives; (*b*) those which though done under general laws are properly matters of local charge and subject to local regulation, such as education and the care of the poor; and (*c*) those which are not so much of

[1] Sometimes the police justices are nominated by the mayor.

a political as of a purely business order, such as the paving and cleansing of streets, the maintenance of proper drains, the provision of water and light. In respect of the first, and to some extent of the second of these groups, the city may be properly deemed a political entity; in respect of the third it is rather to be compared to a business corporation or company, in which the tax-payers are shareholders, doing, through the agency of the city officers, things which each might do for himself, though with more cost and trouble. All three sets of functions are dealt with by legislation in the same way, and are alike given to officials and a legislature elected by persons of whom a large part pay no direct taxes. Education, however, is usually detached from the general city government and entrusted to a separate authority, while in some cities the control of the police has been withheld or withdrawn from that government, and entrusted to the hands of a separate board.

Taxes in cities, as in rural districts, are levied upon personal as well as real property; and the city tax is collected along with the county tax and State tax by the same collectors. Both real and personal property are usually assessed far below their true value, the latter because owners are reticent, the former because the city assessors are anxious to take as little as possible of the State and county burden on the shoulders of their own community, though in this patriotic effort they are checked by the county and State boards of equalization. Taxes are usually so much higher in the larger cities than in the country districts or smaller municipalities, that there is a strong tendency for rich men to migrate from the city to its suburbs in order to escape the city collector. Perhaps the city overtakes them, extending its limits and incorporating its suburbs; perhaps they fly farther afield by the railway and make the prosperity of country towns twenty or thirty miles away. The unfortunate consequence follows, not only that the taxes are heavier for those who remain in the city, but that the philanthropic and political work of the city loses the participation of those who ought to have shared in it. For a man votes in one place only, the place where he resides and pays taxes on his personality; and where he has no vote, he is neither eligible for local office nor deemed entitled to take a part in local political agitation.

CHAPTER L

THE WORKING OF CITY GOVERNMENTS

Two tests of practical efficiency may be applied to the government of a city: What does it provide for the people, and what does it cost the people? Space fails me to apply in detail the former of these tests, by showing what each city does or omits to do for its inhabitants; so I must be content with observing that in the United States generally constant complaints are directed against the bad paving and cleansing of the streets, the non-enforcement of the laws forbidding gambling and illicit drinking, and in some places against the sanitary arrangements and management of public buildings and parks.

The other test, that of expense, is easily applied. Both the debt and the taxation of American cities have risen with unprecedented rapidity, and now stand at an alarming figure.

They have grown much more swiftly than population, swift as has been its growth in cities; and for a large part of the debt there is nothing to show: it is due to waste or corruption.

There is no denying that the government of cities is the one conspicuous failure of the United States. The deficiencies of the National government tell but little for evil on the welfare of the people. The faults of the State governments are insignificant compared with the extravagance, corruption, and mismanagement which mark the administrations of most of the great cities. For these evils are not confined to one or two cities. There is not a city with a population exceeding 200,000 where the poison germs have not sprung into a vigorous life; and in some of the smaller ones, down to 70,000, it needs no microscope to note the results of their growth. Even in cities of the third rank similar phenomena may occasionally be discerned.

For evils which appear wherever a large population is densely

aggregated, there must be some general and widespread causes. What are these causes? The chief sources of the malady, and the chief remedies that have been suggested for or applied to it were summarized by the New York commissioners of 1876 appointed "to devise a plan for the government of cities in the State of New York." They sum up the mischief as follows: —

"1. The accumulation of permanent municipal debt: In New York it was, in 1840, $10,000,000; in 1850, $12,000,000; in 1860, $18,000,000; in 1870, $73,000,000; in 1876, $113,000,000.

"2. The excessive increase of the annual expenditure for ordinary purposes: In 1816 the amount raised by taxation was less than ½ per cent on the taxable property; in 1850, 1.13 per cent; in 1860, 1.69 per cent; in 1870, 2.17 per cent; in 1876, 2.67 per cent. . . . The increase in the annual expenditure since 1850, as compared with the increase of population, is more than 400 per cent, and as compared with the increase of taxable property, more than 200 per cent."

They suggest the following as the causes: —

1. Incompetent and unfaithful governing boards and officers.
2. The introduction of State and National politics into municipal affairs.
3. The assumption by the State legislature of the direct control of local affairs.

This last-mentioned cause of evil is no doubt a departure from the principle of local popular control and responsibility on which State governments and rural local governments have been based. It is a dereliction which has brought its punishment with it. But the resulting mischiefs have been immensely aggregated by the vices of the legislatures in a few of the States, such as New York and Pennsylvania. As regards the two former causes, they are largely due to what is called the Spoils System, whereby office becomes the reward of party service, and the whole machinery of party government made to serve, as its main object, the getting and keeping of places. Now the Spoils System, with the party machinery which it keeps oiled and greased and always working at high pressure, is far more potent and pernicious in great cities than in country districts. For in great cities we find an ignorant multitude, largely composed of recent immigrants, untrained in self-government; we find a great proportion of the voters paying

no direct taxes, and therefore feeling no interest in moderate taxation and economical administration; we find able citizens absorbed in their private businesses, cultivated citizens unusually sensitive to the vulgarities of practical politics, and both sets therefore specially unwilling to sacrifice their time and tastes and comfort in the struggle with sordid wirepullers and noisy demagogues. In great cities the forces that attack and pervert democratic government are exceptionally numerous, the defensive forces that protect it exceptionally ill-placed for resistance. Satan has turned his heaviest batteries on the weakest part of the ramparts.

Besides these three causes on which the commissioners dwell, and the effects of which are felt in the great cities of other States as well as of New York, though perhaps to a less degree, there are what may be called mechanical defects in the structure of municipal governments, whose nature may be gathered from the account given in last chapter. There is a want of methods for fixing public responsibility on the governing persons and bodies. If the mayor jobs his patronage he can throw a large part of the blame on the aldermen or other confirming council, alleging that he would have selected better men could he have hoped that the aldermen would approve his selection. If he has failed to keep the departments up to their work, he may argue that the city legislature hampered him and would not pass the requisite ordinances. Each house of a two-chambered legislature can excuse itself by pointing to the action of the other, or of its committees, and among the numerous members of the chambers — or even of one chamber if there be but one — responsibility is so divided as to cease to come forcibly home to any one. The various boards and officials have generally had little intercommunication;[1] and the fact that some were directly elected by the people made these feel themselves independent both of the mayor and the city legislature. The mere multiplication of elective posts distracts the attention of the people, and deprives the voting at the polls of its efficiency as a means of reproof or commendation.

[1] In Philadelphia some one has observed that there were four distinct and independent authorities with power to tear up the streets, and that there was no authority upon whom the duty was specially laid to put them in repair again.

The remedies proposed by the New York commission were the following: —

(*a*) A restriction of the power of the State legislature to interfere by special legislation with municipal governments or the conduct of municipal affairs.

(*b*) The holding of municipal elections at a different period of the year from State and National elections.

(*c*) The vesting of the legislative powers of municipalities in two bodies: — A board of aldermen, elected by the ordinary (manhood) suffrage, to be the common council of each city. A board of finance of from six to fifteen members, elected by voters who had for two years paid an annual tax on property assessed at not less than $500, or a rent (for premises occupied) of not less than $250.[1] This board of finance was to have a practically exclusive control of the taxation and expenditure of each city, and of the exercise of its borrowing powers, and was in some matters to act only by a two-thirds majority.

(*d*) Limitations on the borrowing powers of the municipality, the concurrence of the mayor and two-thirds of the State legislature, as well as of two-thirds of the board of finance being required for any loan except in anticipation of current revenue.

(*e*) An extension of the general control and appointing power of the mayor, the mayor being himself subject to removal for cause by the governor of the State.

To introduce all of these reforms it became necessary to amend the Constitution of the State of New York; and the commission drafted a series of amendments accordingly. These went before the State legislature. But the birds saw the net, and naturally omitted to submit the amendments to the people. The report, in fact, fell to the ground. Some beneficial changes have, however, been made by the new Constitution of the State adopted in 1894, though it is too soon to judge the working of the changes.

Among the other reforms in city government which I find canvassed in America are the following: —

(*a*) Civil service reform, *i.e.* the establishment of examina-

[1] This was to apply to cities with a population exceeding 100,000. In smaller cities the rent was to be $100 at least, and no minimum for the assessed value of the taxed property was to be fixed.

tions as a test for admission to posts under the city, and the bestowal of these posts for a fixed term of years, or generally during good behaviour, instead of leaving the civil servant at the mercy of a partisan chief, who may displace him to make room for a party adherent or personal friend.

(*b*) The lengthening of the terms of service of the mayor and the heads of departments, so as to give them a more assured position and diminish the frequency of election. — This has been done to some extent in recent charters — witness St. Louis and Philadelphia.

(*c*) The vesting of almost autocratic executive power in the mayor and restriction of the city legislature to purely legislative work and the voting of supplies. — This also finds place in recent charters, notably in that of Brooklyn, and has worked, on the whole, well. It is, of course, a remedy of the "cure or kill" order. If the people are thoroughly roused to choose an able and honest man, the more power he has the better; it is safer in his hands than in those of city councils. If the voters are apathetic and let a bad man slip in, all may be lost till the next election. I do not say "all is lost," for there have been remarkable instances of men who have been sobered and elevated by power and responsibility.

(*d*) The election of a city legislature, for one branch of it, or of a school committee, on a general ticket instead of by wards. — When aldermen or councilmen are chosen by the voters of a small local area, it is assumed, in the United States, that they must be residents within it; thus the field of choice among good citizens generally is limited. It follows also that their first duty is deemed to be to get the most they can for their own ward; they care little for the general interests of the city, and carry on a game of barter in contracts and public improvements with the representatives of other wards. Hence the general ticket system is preferable.

(*e*) The limitation of taxing powers and borrowing powers by reference to the assessed value of the taxable property within the city. — Restrictions of this nature have been largely applied to cities as well as to counties and other local authorities. The results have been usually good, yet not uniformly so, for evasions may be practised.

Such restrictions are now often found embodied in State

constitutions, and have usually, so far as I could ascertain, diminished the evil they are aimed at.

The question of city government is that which chiefly occupies practical publicists, because it is admittedly the weakest point of the country. That adaptability of the institutions to the people and their conditions, which judicious strangers have been wont to admire in the United States, and that consequent satisfaction of the people with their institutions, which contrasts so agreeably with the discontent of European nations, is wholly absent as regards municipal administration. Wherever there is a large city there are loud complaints, and Americans who deem themselves in other respects a model for the Old World are in this respect anxious to study Old World models, those particularly which the cities of Great Britain present. The best proof of dissatisfaction is to be found in the frequent changes of system and method. The newer frames of government are an improvement upon the older. Rogues are less audacious. Good citizens are more active. Party spirit is still permitted to dominate and pervert municipal politics, yet the mischief it does is more clearly discerned and the number of those who resist it daily increases. In the increase of that number and the growth of a stronger sense of civic duty rather than in any changes of mechanism, lies the ultimate hope for the reform of city governments.

CHAPTER LI

AN AMERICAN VIEW OF MUNICIPAL GOVERNMENT IN THE UNITED STATES[1]

By the Hon. SETH LOW, President of Columbia College, New York, and formerly Mayor of the City of Brooklyn

A CITY in the United States is quite a different thing from a city in its technical sense, as the word is used in England. In England a city is usually taken to be a place which is or has been the seat of a bishop.[2] The head of a city government in England is a mayor, but many boroughs which are not cities are also governed by a mayor. In the United States a city is a place which has received a charter as a city from the legislature of its State. In America there is nothing whatever corresponding to the English borough. Whenever in the United States one enters a place that is presided over by a mayor, he may generally understand that he is in a city; save that here and there incorporated villages have mayors.

Any European student of politics who wishes to understand the problem of government in the United States, whether of city government or any other form of it, must first of all transfer himself, if he can, to a point of view precisely the opposite of that which is natural to him. This is scarcely, if at all, less true of the English than of the continental student. In England as upon the continent, from time immemorial, government has descended from the top down. Until recently, society in Europe has accepted the idea, almost without protest, that there must be governing classes, and that the great majority of men must be governed. The French Revolution doubtless

[1] This chapter is copyright, by Seth Low, 1888.

[2] In Scotland, where there have been, since the Revolution, no bishops, Edinburgh, Glasgow, Aberdeen, and now (1889) Dundee are described as cities. In England Westminster is called a city. It had, however, for a short time, a bishop.

modified this idea everywhere, and especially in France, but even in France public sentiment on this point is a resultant of a conflict of views. In the United States, however, that idea does not obtain at all, and, what is of scarcely less importance, it never has obtained. No distinction is recognized of governing and governed classes, and the problem of government is, in effect, an effort on the part of society as a whole to learn and apply to itself the art of government.

Bearing this in mind, it becomes apparent that the immense tide of immigration into the United States is a continually disturbing factor. The immigrants come from many countries, a very large proportion of them being of the classes which, in their old homes, from time out of mind, have been governed. Arriving in America, they shortly become citizens in a society which undertakes to govern itself. However well-disposed they may be as a rule, they have not had experience in self-government, nor do they always share the ideas which have expressed themselves in the Constitution of the United States. This foreign element settles largely in the cities of the country. It is estimated that the population of New York City contains eighty per cent of people who either are foreign-born, or who are the children of foreign-born parents. Consequently, in a city like New York, the problem of learning and applying the art of government is handed over to a population that begins in point of experience very low down. In many of the cities of the United States, indeed in almost all of them, the population not only is thus largely untrained in the art of self-government, but it is not even homogeneous. So that an American city is confronted not only with the necessity of instructing large and rapidly growing bodies of people in the art of government, but it is compelled at the same time to assimilate strangely different component parts into an American community. It will be apparent to the student that either one of these functions by itself would be difficult enough. When both are found side by side the problem is increasingly difficult as to each. Together they represent a problem such as confronts no city in the United Kingdom, or in Europe.

The American city has had problems to deal with also of a material character, quite different from those which have confronted the cities of the Old World. With the exception of

Boston, Philadelphia, Baltimore, New Orleans, and New York, there is no American city of great consequence whose roots go back into the distant past even of America. American cities as a rule have grown with a rapidity to which the Old World presents few parallels. London, in the extent of its growth, but not in the proportion of it, Berlin since 1870, and Rome in the last few years, are perhaps the only places in Europe which have been compelled to deal with this element of rapid growth in anything like a corresponding degree. All of these cities, London, Berlin, and Rome, are the seats of the national government, and receive from that source more or less help and guidance in their development. In all of them an immense nucleus of wealth existed before this great and rapid growth began. The problem in America has been to make a great city in a few years out of nothing. There has been no nucleus of wealth upon which to found the structure which every succeeding year has enlarged. Recourse has been had of necessity, under these conditions, to the freest use of the public credit. The city of Brooklyn and the city of Chicago, each with a population of a million or more of people,[1] are but little more than fifty years old. In that period everything has been created out of the fields. The houses in which the people live, the water-works, the paved streets, the sewers, everything which makes up the permanent plant of a city, all have been produced while the city has been growing from year to year at a fabulous rate. Besides these things are to be reckoned the public schools, the public parks, and in the case of Brooklyn, the great bridge connecting it with New York, two-thirds of the cost of which is borne by Brooklyn. Looked at in this light the marvel would seem to be, not so much that the American cities are justly criticisable for many defects, but rather that results so great have been achieved in so short a time.

The necessity of doing so much so quickly has worked to the disadvantage of the American city in two ways. First, it has compelled very lavish expenditure under great pressure for quick results. This is precisely the condition under which the best trained business men make their greatest mistakes,

[1] Chicago has more than 1,000,000 and Brooklyn over 900,000.

and are in danger of running into extravagance and wastefulness. No candid American will deny that American cities have suffered largely in this way, not alone from extravagance and wastefulness, but also from dishonesty; but in estimating the extent of the reproach, it is proper to take into consideration these general conditions under which the cities have been compelled to work. The second disadvantage which American cities have laboured under from this state of things has been their inability to provide adequately for their current needs, while discounting the future so freely in order to provide their permanent plant. When the great American cities have paid for the permanent plant which they have been accumulating during the last half century, so that the duty which lies before them is chiefly that of caring adequately for the current life of their population, a vast improvement in all these particulars may reasonably be expected. In other words, time is a necessary element in making a great city, as it is in every other great and enduring work. American cities are judged by their size rather than by the time which has entered into their growth. It cannot be denied that larger results could have been produced with the money expended if it always had been used with complete honesty and good judgment. But to make an intelligent criticism upon the American city, in its failures upon the material side, these elements of difficulty must be taken into consideration.

Another particular in which the American city may be thought to have come short of what might have been hoped for, may be described in general terms as a lack of foresight. It would have been comparatively easy to have preserved in all of them small open parks, and generally to have made them more beautiful, if there had been a greater appreciation of the need for these things and of the growth the cities were to attain to. The Western cities probably have erred in this regard less than those upon the Atlantic coast. But while it is greatly to be regretted that this large foresight has not been displayed, it is after all only repeating in America what has taken place in Europe. The improvement of cities seems everywhere to be made by tearing down and replacing at great cost, rather than by a far-sighted provision for the demands and opportunities of the future. These unfortunate results

in America have flowed largely from two causes: first, from inability on the part of the cities to appreciate in advance the phenomenal growth that has come upon them; and second, from the frequent tendency of population to grow in precisely the direction where it was not expected to. A singular illustration of this last factor is to be found in the city of Washington. The Capitol was made to face towards the east, under the impression that population would settle in that direction. As matter of fact the city has grown towards the west, so that the Capitol stands with its back to the city and faces a district that is scarcely built upon at all.

Probably no detail strikes the eye of the foreigner more unfavourably in connection with the average American city than the poor paving of the streets and their lack of cleanliness. The comparison with cities of Europe in these respects is immensely to the disadvantage of the American city. But, in this connection, it is not unfair to call attention to the fact that the era of good paving and clean streets in Europe is scarcely more than thirty years old. Poor as is the condition of the streets in most American cities now, it would be risking very little to say that it would average much higher than ten years ago. There are several contributing causes which are reflected in this situation that represent difficulties from which most European cities are free. In the first place, frost strikes much deeper in America, and is more trying to the pavements in every way. In the next place, the streets are more often disturbed in connection with gas pipe, steam pipes, and telegraph service, than in European cities. But, apart from these incidental difficulties, the fundamental trouble in connection with the streets of American cities is the lack of sufficient appropriations to put them in first-class condition and to keep them so, both as to paving and as to cleaning. The reason for this has been pointed out.

All the troubles, however, which have marked the development of cities in the United States are not due to these causes. Cities in the United States, as forms of government, are of comparatively recent origin. The city of Boston, for example, in the State of Massachusetts, although the settlement was founded more than two hundred and fifty years ago, received its charter as a city so recently as 1822. The city of Brooklyn

received its charter from the State of New York in 1835. In other words, the transition from village and town government into government by cities, has simply followed the transition of small places into large communities. This suggests another distinction between the cities of the United States and those of Great Britain. The great cities of England and of Europe, with few exceptions, have their roots in the distant past. Many of their privileges and chartered rights were wrested from the Crown in feudal times. Some of these privileges have been retained, and contribute to the income, the pride, and the influence of the municipality. The charter of an American city represents no element of prestige or inspiration. It is only the legal instrument which gives the community authority to act as a corporation, and which defines the duties of its officers. The motive for passing from town government to city government in general has been the same everywhere — to acquire a certain readiness of action, and to make more available the credit of the community in order to provide adequately for its own growth. The town meeting, in which every citizen takes part, serves its purpose admirably in communities up to a certain size, or for the conducting of public work on not too large a scale. But the necessity for efficiency in providing for the needs of growth has compelled rapidly growing communities, in all the States, to seek the powers of a corporation as administered through a city government. Growing thus out of the town, it happened very naturally that the first conception of the city on the part of Americans was that which had applied to the town and the village as local subdivisions of the commonwealth.

Charters were framed as though cities were little States. Americans are only now learning, after many years of bitter experience, that they are not so much little States as large corporations. Many of the mistakes which have marked the progress of American cities up to this point have sprung from that defective conception. The aim deliberately was, to make a city government where no officer by himself should have power enough to do much harm. The natural result of this was to create a situation where no officer had power to do much good. Meanwhile bad men united for corrupt purposes, and the whole organization of the city government aided such in throwing

responsibility from one to another. Many recent city charters in the United States proceed upon the more accurate theory that cities, in their organic capacity, are chiefly large corporations. The better results flowing from this theory are easily made clear. Americans are sufficiently adept in the administration of large business enterprises to understand that, in any such undertaking, some one man must be given the power of direction and the choice of his chief assistants; they understand that power and responsibility must go together from the top to the bottom of every successful business organization. Consequently, when it began to be realized that a city was a business corporation rather than an integral part of the State, the unwillingness to organize the city upon the line of concentrated power in connection with concentrated responsibility began to disappear. The charter of the city of Brooklyn is probably as advanced a type as can be found of the results of this mode of thinking.

In Brooklyn the executive side of the city government is represented by the mayor and the various heads of departments. The legislative side consists of a common council of nineteen members, twelve of whom are elected from three districts each having four aldermen, the remaining seven being elected as aldermen at large by the whole city. The people elect three city officers besides the board of aldermen; the mayor, who is the real, as well as the nominal, head of the city; the comptroller, who is practically the book-keeper of the city; and the auditor, whose audit is necessary for the payment of every bill against the city whether large or small. The mayor appoints absolutely, without confirmation by the common council, all the executive heads of departments. He appoints, for example, the police commissioner, the fire commissioner, the health commissioner, the commissioner of city works, the corporation counsel or counsellor at law, the city treasurer, the tax collector, and in general all the officials who are charged with executive duties. These officials in turn appoint their own subordinates, so that the principle of defined responsibility permeates the city government from top to bottom. The mayor also appoints the board of assessors, the board of education, and the board of elections. The executive officers appointed by the mayor are appointed for a term of two years

that is to say, for a term similar to his own. The mayor is elected at the general election in November; he takes office on the first of January following, and for one month the great departments of the city are carried on for him by the appointees of his predecessor. On the first of February it becomes his duty to appoint his own heads of departments, and inasmuch as they serve for the same term as himself, each incoming mayor thus has the opportunity to make an administration in all its parts in sympathy with himself. Each one of these great executive departments is under the charge of a single head, the charter of the city conforming absolutely to the theory that where executive work is to be done it should be committed to the charge of one man. Where boards of officials exist in Brooklyn, it is because the work committed to them is discretionary more than it is executive in character. These boards, also, are appointed by the mayor without confirmation by the board of aldermen, but they are appointed for terms not coterminous with his own; so that, in most cases, no mayor would appoint the whole of any such board unless he were to be twice elected by the people. In other words, with quite unimportant exceptions, the charter of Brooklyn, a city with 900,000 inhabitants, makes the mayor entirely responsible for the conduct of the city government on its executive side, and, in holding him to this responsibility, equips him fearlessly with the necessary power to discharge his trust.

This charter went into effect on the first of January 1882. It has been found to have precisely the merits and the defects which one might expect of such an instrument. A strong executive can accomplish satisfactory results; a weak one can disappoint every hope. The community, however, is so well satisfied that the charter is a vast improvement on any system which it has tried before, that no voice is raised against it. It has had one notable and especially satisfactory effect. It can be made clear to the simplest citizen that the entire character of the city government for two years depends upon the man chosen for the office of mayor. As a consequence more people have voted in Brooklyn on the subject of the mayoralty than have voted there as to who should be governor of the State. This is a great and a direct gain for good city

government, because it creates and keeps alert a strong public sentiment, and tends to increase the interest of all citizens in the affairs of their city. In the absence of a historic past which ministers to civic pride, and in the presence of many thousands of new-comers at every election, this effect is especially valuable. It may also be said that under present conditions the voting is more intelligent than formerly. The issue is so important, yet so simple, that it can be made clear even to people who have lived but a short time in the city. The same influences tend to secure for the city the services, as mayor, of a higher grade of men, because under such a charter the mayor is given power and opportunity to accomplish something. It appeals to the best that is in a man as strongly as it exposes him to the fire of criticism if he does not do well.

In undertaking to administer this charter, as the first mayor to whom such powers had been committed, the writer adopted two principles which he believed to be essential to success. In the first place, he determined to hold each head of department responsible for results within his department; and in the second place, he determined to hold himself entirely aloof from the use of patronage, except in so far as the charter of the city, in express terms, made it his duty to make appointments. The effect of this attitude towards his appointees was to leave them entirely free in the choice of their subordinates. Being free, they could justly be held responsible, to the fullest extent, for results. Further than that, being free from pressure from the mayor, they were much stronger to resist pressure as to patronage from outsiders than otherwise they would have been. Another effect of the mayor's attitude with reference to patronage was to secure for himself the confidence of the community, without regard to party, to an unusual extent. Any alarm there might have been, as to the use of the great and unusual powers committed to the mayor by the charter, was quieted at once.

The duties of the mayor under the charter may be considered under three heads. First, in his relation to the executive work of the city; second, in his relation to the common council or local legislature; third, in his relation to the legislature of the State.

The successful use of the power of appointment, in the selec-

tion of efficient heads of departments, of course underlies the success of a city administration on its executive side. The heads of departments having been appointed, it was the custom of the writer to hold a meeting in the mayor's office with all his executive appointees, once every week, excepting during the summer when the common council was not in session. This meeting served several purposes. The minutes of the common council at their previous meeting were laid before this informal gathering, and the mayor received the advice of the officer whose department would be affected by any proposed resolution or ordinance, as to its probable effect. When a question was brought up of general interest to the city the whole company discussed it, giving to the mayor the advantage of their experience and judgment. These weekly councils were of great value to the mayor in determining his attitude on the various questions raised during his term by the common council of the city, every resolution of which body had by law to be passed upon by the mayor, and receive either his approval or his veto. These gatherings of the executive officers of the city were useful in other ways than this. They made all heads of departments personally acquainted with each other, and converted the machinery of the city government, from separate and independent departments, into one organization working in complete harmony and with singleness of aim.

The mayor's oversight of the executive work of the city, in its current aspect, was further maintained by quarterly reports submitted from each of the large departments. The mayor's office, in an American city, is in receipt of daily complaints touching this or that matter affecting citizens. The receipt of all complaints was immediately acknowledged to the persons who made them, if they came by mail, and the complaints were forwarded at once to the proper department for action or explanation. The reply was made to the mayor's office, and was communicated without delay to the maker of the complaint. If remedy was available, this method secured its prompt application. If the matter were beyond reach of remedy, the citizen had at least the satisfaction of knowing why. The multiplicity and character of these complaints gave the mayor a daily insight into the efficiency of the departments. By these methods, the mayor was able to keep himself almost as well

informed as to the work in each department of the city as the head of a great business house is informed as to the departments into which his business is divided. Nor need the comparison stop there. The mayor was able to bring the power and influence of his office to bear, to remedy abuses or to suggest improvements in methods, with the same directness and efficiency.

The mayor's duties in relation to the common council of the city are chiefly in connection with the obligation, laid upon him by the charter, to approve or disapprove every resolution passed by that body. The mayor's veto is fatal, unless overridden by a two-thirds vote of all the members elected to the council. For three years out of four during which the writer served as mayor, the common council was politically antagonistic to him, half of the time in the proportion of fourteen to five. Notwithstanding this, only two vetoes were overridden in the whole of his four years of service. Two influences probably contributed to this result. First, the care with which, under the advice of his appointees, the mayor took up his positions: and second, the mayor's refusal to implicate himself, in any way, with the use of patronage. Partisan opposition largely disappeared, before a spirit manifestly free from self-seeking and from partisanship. The same influences led to unusual co-operation, on the part of the common council, in forwarding the plans of the mayor in the direction of positive action. The harmony between the executive and the legislature of the city was scarcely less complete, during this interval, to the great advantage of the city, than was the harmony between the different executive departments themselves.

The relation of the mayor to the legislature of the State proved to be important to an extent not easy to be imagined. The charter of a city, coming as it does from the legislature, is entirely within the control of the legislature. Just as there is no legal bar to prevent the legislature from recalling the charter altogether, so there is no feature of the charter so minute that the legislature may not assume to change it. In the State of New York there is no general law touching the government of cities, and the habit of interference in the details of city action has become to the legislature almost a second nature. In every year of his term, the writer was com-

pelled to oppose at Albany, the seat of the State legislature, legislation seeking to make an increase in the pay of policemen and firemen, without any reference to the financial ability of the city, or the other demands upon the city for the expenditure of money. Efforts were made, also, at one time, to legislate out of office some of the officials who had been appointed in conformity to the charter. New and useless offices were sought to be created, and the mayor found that not the least important of his duties, as mayor, was to protect the city from unwise and adverse legislation on the part of the State. It is a curious circumstance that most of these propositions had their origin with members of the legislature elected to represent different districts of the city itself. The same influences which made the administration strong with the common council, at home, made it also strong with the legislature at Albany, so that, although for one or two years the power to make changes rested with a majority at Albany politically antagonistic, no law objected to by the mayor, during this interval, was placed upon the statute-book. The city itself is compelled at times to seek legislation for the enlargement of its powers; that is to say, the powers committed to a city are strictly limited to those defined by the charter or granted by special acts of the legislature. Consequently, when an unforeseen situation is to be dealt with, calling for unusual methods or powers, it is necessary to secure authority to this end from the legislature of the State. The writer found the same general attitude, which has been referred to so often, effectual in this regard also, so that almost every bill which he desired in the interest of the city was enacted into law, and this alike by legislatures politically in sympathy with the city administration and by legislatures politically antagonistic to it. It is not too much to say, however, that the greatest anxieties of his term sprang from the uncertainties and difficulties of this annual contest, on the one hand to advance the interest of the city, and on the other to save it from harm in its relations to the law-making power of the State.

Imitating this charter of Brooklyn, the city of Philadelphia, still more recently, has obtained a new charter involving a great departure in the same direction from old methods. Boston and New York both have moved partly along the same

line, each with admitted advantage to the city, although neither has gone so far as Brooklyn or Philadelphia. Several smaller places have obtained charters of the same kind. It is not to be supposed that this new form of city charter is the result altogether of abstract thinking. It has grown out of bitter experiences. When the inhabitants of a city found that they did not receive, as matter of fact, the good government which they desired, it did not at first occur to them that the trouble was to a large extent fundamental in their form of charter; or, if it did, the first effort at remedy led to worse mistakes than before. Starting with the theory that the path to safety was through division of power, they resorted to all manner of expedients which would compass that end. They established, for instance, police boards and fire boards, which at different times were made to consist of three members, and at other times of four, the latter being known in American parlance as non-partisan.[1] It was supposed that a single individual might be tempted to use his department unfairly in the interest of the party to which he belonged, but that by associating him with others of different parties this tendency would be overcome. It turned out, however, that the moment no one in particular was to blame, partisanship took complete possession of the administration of every department.

When one reflects that in the government of the United States the immense administrative departments, like the treasury and the post-office, have, from the beginning of the government, been committed to the care of a single man, it seems strange that, in their cities, Americans should have been so unwilling to proceed upon the same theory. The reason probably is that the city, as above pointed out, has been evolved from the town by the simple process of enlargement. In the town the theory of division of power has been acted upon with substantial uniformity, and in small communities has worked well. The attempt to act upon the same lines in the great and rapidly growing cities of the country has, in the judgment of many, been as instrumental as any other one element in causing the unsatisfactory results which have marked the progress of many American cities. For the purposes of this chapter it is not

[1] Non-partisan practically means that the two great parties are equally represented upon it.

necessary to enlarge further upon this thought. It is emphasized thus far for the purpose of showing that all the large class of difficulties which American cities have been obliged to face by reason of faulty charters are not irremediable. The actual process of change from one system of charter to another has been marked incidentally by one unfortunate effect. The city charter, coming as it does from the legislature, lies entirely within the control of the legislature. The many appeals to the legislature for charter amendment of one kind and another have bred a habit in some of the States, if not in all, of constant interference by the legislature with the local details of city action. This interference, though often prompted by a genuine desire to relieve a city from pressing evils, has tended very greatly to lessen the sense of responsibility on the part of local officials, and upon the part of communities themselves. It is one of the best effects of Brooklyn's charter, that it has helped to create in that city a very decided spirit of home rule, which is ready to protest at any moment against interference on the part of the State with local matters.

It remains to be said that the one organic problem in connection with the charters of cities, which apparently remains as far from solution as ever in America, is that which concerns the legislative branch of city government. In some cities the legislative side is represented by two bodies, or Houses, known by different names in different cities, and presenting the same general characteristics as a State legislature with its upper and lower House. The most conspicuous instances of this kind are furnished by the city of Boston and the city of Philadelphia. In all the cities of New York State, the legislative branch consists of a single chamber indifferently spoken of as the board of aldermen or the common council. But whether these bodies have been composed of one House or two, the moment a city has become large they have ceased to give satisfactory results. Originally these bodies were given very large powers, in order to carry out to the utmost the idea of local self-government. As a rule they have so far abused these powers that almost everywhere the scope of their authority has been greatly restricted. In the city of New York that tendency has been acted upon to so great an extent as to deprive the common council of every important function it

ever possessed, except the single power to grant public franchises. How greatly they have abused this remaining power is unfortunately matter of public record. The powers thus taken away from the common council, are ordinarily lodged with boards made up of the higher city officials. Even in the city of New York it has seldom been the case that the mayor of the city has not been a man of good repute and of some parts. As a general proposition, it is found in American cities that the larger the constituency to which a candidate must appeal, and the more important the office, the more of a man the candidate must be. What may be the outcome of this difficulty as to the legislative body in cities, it is impossible to say. Sometimes it seems almost as though the attempt would be made to govern cities without any local legislature. But, on the other hand, there are so many matters in regard to which such a body ought to have power, that thus far no one has ventured seriously to take so extreme a view. It may fairly be said to be, therefore, the great unsolved organic problem in connection with municipal government in the United States. That it is so, illustrates with vividness the justice of the American view that it is a dangerous thing, in wholly democratic communities, to make the legislative body supreme over the executive.

Thus far in this chapter, the shortcomings of the American city have been admitted, and the effort has been made to show the peculiar difficulties with which such a city has to deal. It ought to be said that, despite all of these difficulties, the average American city is not going from bad to worse. There is substantial reason for thinking that the general tendency, even in the larger cities, is towards improvement. Life and property are more secure in almost all of them than they used to be. Certainly there has been no decrease of security such as might reasonably have been expected to result from increased size. Less than a score of years ago it was impossible to have a fair election in New York or Brooklyn. To-day, and for the last decade, under the present system of registry laws, every election is held with substantial fairness. The health of our cities does not deteriorate, but on the average improves. So that in the large and fundamental aspect of the question the progress, if slow, is steady in the direction of better things. It is not

strange that a people conducting an experiment in city government for which there is absolutely no precedent, under conditions of exceptional difficulty, should have to stumble towards correct and successful methods through experiences that are both costly and distressing. There is no other road towards improvement in the coming time. But it is probable that in another decade Americans will look back on some of the scandals of the present epoch in city government with as much surprise as they now regard the effort to control fires by the volunteer fire department, which was insisted upon, even in the city of New York, until within twenty-five years.

As American cities grow in stability, and provide themselves with the necessary working plant, they approximate more and more in physical conditions to those which prevail in most European cities. As they do so, it is reasonable to expect that their pavements will improve and the condition of their streets be more satisfactory. American cities, as a rule, have a more abundant supply of water than European cities, and they are more enterprising in furnishing themselves with what in Europe might be called the luxuries of city life, but which, in America, are so common as almost to be regarded as necessities. Especially is this true of every convenience involving the use of electricity. There are more telephone wires, for example, in New York and Brooklyn, than in the whole of the United Kingdom. The problem of placing these wires underground therefore, to take in passing an illustration, of another kind, of the difficulties of city government in America, is vastly greater than in any city abroad, because the multiplication of the wires is so constant and at so rapid a rate that as fast as some are placed beneath the surface, those which have been strung while this process has been going on seem as numerous as before the underground movement began.

It may justly be said, therefore, that the American city, if open to serious blame, is also deserving of much praise. Every one understands that universal suffrage has its drawbacks, and in cities these defects become especially evident. It would be uncandid to deny that many of the problems of American cities spring from this factor, especially because the voting population is continually swollen by foreign immigrants whom time alone can educate into an intelligent harmony with the Ameri-

can system. But because there is scum upon the surface of a boiling liquid, it does not follow that the material, nor the process to which it is subjected, is itself bad. Universal suffrage, as it exists in the United States, is not only a great element of safety in the present day and generation, but it is perhaps the mightiest educational force to which the masses of men ever have been exposed. In a country where wealth has no hereditary sense of obligation to its neighbours, it is hard to conceive what would be the condition of society if universal suffrage did not compel every one having property to consider, to some extent at least, the well-being of the whole community.

It is probable that no other system of government would have been able to cope any more successfully, on the whole, with the actual conditions that American cities have been compelled to face. It may be claimed for American institutions, even in cities, that they lend themselves with wonderfully little friction to growth and development and to the peaceful assimilation of new and strange populations. Whatever defects have marked the progress of such cities, no one acquainted with their history will deny that since their problem assumed its present aspect, progress has been made, and substantial progress, from decade to decade. The problem will never be anything but a most difficult one, but with all its difficulties there is every reason to be hopeful.

PART III

POLITICAL METHODS AND PHYSICAL INFLUENCES

CHAPTER LII

POLITICAL PARTIES AND THEIR HISTORY

In the United States, the history of party begins with the Constitutional Convention of 1787 at Philadelphia. In its debates and discussions on the drafting of the Constitution there were revealed two opposite tendencies, which soon afterwards appeared on a larger scale in the State conventions, to which the new instrument was submitted for acceptance. These were the centrifugal and centripetal tendencies — a tendency to maintain both the freedom of the individual citizen and the independence in legislation, in administration, in jurisdiction, indeed in everything except foreign policy and National defence, of the several States; an opposite tendency to subordinate the States to the nation and vest large powers in the central Federal authority.

The charge against the Constitution that it endangered State rights evoked so much alarm that some States were induced to ratify only by the promise that certain amendments should be added, which were accordingly accepted in the course of the next three years. When the machinery had been set in motion by the choice of George Washington as President, and with him of a Senate and a House of Representatives, the tendencies which had opposed or supported the adoption of the Constitution reappeared not only in Congress but in the President's Cabinet, where Alexander Hamilton, secretary of the treasury, counselled a line of action which assumed and required the exercise of large powers by the Federal government, while Jefferson, the secretary of state, desired to practically restrict its action to foreign affairs. The advocates of a central National authority had begun to receive the name of Federalists, and to act pretty constantly together, when an event happened which, while it tightened their union, finally consolidated their opponents also into a party.

This was the creation of the French Republic and its

declaration of war against England. The Federalists, who were shocked by the excesses of the Terror of 1793, counselled neutrality, and were more than ever inclined to value the principle of authority, and to allow the Federal power a wide sphere of action. The party of Jefferson, who had now retired from the administration, were pervaded by sympathy with French ideas, were hostile to England, whose attitude continued to be discourteous, and sought to restrict the interference of the central government with the States, and to allow the fullest play to the sentiment of State independence, of local independence, of personal independence. This party took the name of Republicans or Democratic Republicans, and they are the predecessors of the present Democrats. Both parties were, of course, attached to Republican government — that is to say, were alike hostile to a monarchy. But the Jeffersonians had more faith in the masses and in leaving things alone, together with less respect for authority, so that in a sort of general way one may say that while one party claimed to be the apostles of Liberty, the other represented the principle of Order.

These tendencies found occasion for combating one another, not only in foreign policy and in current legislation, but also in the construction and application of the Constitution. Like all documents, and especially documents which have been formed by a series of compromises between opposite views, it was and is susceptible of various interpretations, which the acuteness of both sets of partisans was busy in discovering and expounding. While the piercing intellect of Hamilton developed all those of its provisions which invested the Federal Congress and President with far-reaching powers, and sought to build up a system of institutions which should give to these provisions their full effect, Jefferson and his coadjutors appealed to the sentiment of individualism strong in the masses of the people, and, without venturing to propose alterations in the text of the Constitution, protested against all extensions of its letter, and against all the assumptions of Federal authority which such extensions could be made to justify. Thus two parties grew up with tenets, leaders, impulses, sympathies, and hatreds.

At first the Federalists had the best of it, for the reaction

against the weakness of the old Confederation which the Union had superseded disposed sensible men to tolerate a strong central power. The President, though not a member of either party, was, by force of circumstances, as well as owing to the influence of Hamilton, practically with the Federalists. But during the presidency of John Adams, who succeeded Washington, they committed grave errors. When the presidential election of 1800 arrived, it was seen that the logical and oratorical force of Hamilton's appeals to the reason of the nation told far less than the skill and energy with which Jefferson played on their feelings and prejudices. The Republicans triumphed in the choice of their chief, who retained power for eight years, to be peaceably succeeded by his friend Madison for another eight years, and his disciple Monroe for eight years more. Their long-continued tenure of office was due not so much to their own merits, for neither Jefferson nor Madison conducted foreign affairs with success, as to the collapse of their antagonists. The Federalists never recovered from the blow given in the election of 1800. They lost Hamilton by death in 1804. No other leader of equal gifts appeared, and the party, which had shown little judgment in the critical years 1810–14, finally disappears from sight after the second peace with England in 1815.

This period (1788–1824) may be said to constitute the first act in the drama of American party history. The people, accustomed hitherto to care only for their several commonwealths, learn to value and to work their new National institutions. They become familiar with the Constitution itself, as partners get to know, when disputes arise among them, the provisions of the partnership deed under which their business has to be carried on. It is found that the existence of a central Federal power does not annihilate the States, so the apprehensions on that score are allayed. It it also discovered that there are unforeseen directions, such for instance as questions relating to banking and currency and internal communications, through which the Federal power can strengthen its hold on the nation. Differences of view and feeling give rise to parties, yet parties are formed by no means solely on the basis of general principles, but owe much to the influence of prominent personalities, of transient issues, of local interests or prejudices.

The small farmers and the Southern men generally follow the Republican standard borne aloft by the great State of Virginia, while the strength of the Federalists lies in New England and the Middle States, led sometimes by Massachusetts, sometimes by Pennsylvania. The commercial interest was with the Federalists, and the staid solid Puritanism of all classes, headed by the clergy. Some one indeed has described the struggle from 1796 to 1808 as one between Jefferson, who was an avowed free-thinker, and the New England ministers; and no doubt the ministers of religion did in the Puritan States exert a political influence approaching that of the Presbyterian clergy in Scotland during the seventeenth century.

Jefferson's importance lies in the fact that he became the representative not merely of democracy, but of local democracy, of the notion that government is hardly wanted at all, that the people are sure to go right if they are left alone, that he who resists authority is *prima facie* justified in doing so, because authority is *prima facie* tyrannical, that a country where each local body in its own local area looks after the objects of common concern, raising and administering any such funds as are needed, and is interfered with as little as possible by any external power, comes nearest to the ideal of a truly free people.

As New England was, by its system of local self-government through the town meeting, as well as by the absence of slavery, in some respects the most democratic part of the United States, it may seem surprising that it should have been a stronghold of the Federalists. The reason is to be found partly in its Puritanism, which revolted at the deism or atheism of the French revolutionists, partly in the interests of its shipowners and merchants, who desired above all things a central government which, while strong enough to make and carry out treaties with England and so secure the development of American commerce, should be able also to reform the currency of the country and institute a National banking system. Industrial as well as territorial interests were already beginning to influence politics.

That the mercantile and manufacturing classes, with all the advantages given them by their wealth, their intelligence, and their habits of co-operation, should have been vanquished by the agricultural masses, may be ascribed partly to the fact that the democratic impulse of the War of Independence was strong

among the citizens who had grown to manhood between 1780 and 1800, partly to the tactical errors of the Federalist leaders, but largely also to the skill which Jefferson showed in organizing the hitherto undisciplined battalions of Republican voters. Thus early in American history was the secret revealed, which Europe is only now discovering, that in free countries with an extended suffrage, numbers without organization are helpless and with it omnipotent.

Although the Federalists were in general the advocates of a loose and liberal construction of the fundamental instrument, because such a construction opened a wider sphere to Federal power, they were ready, whenever their local interests stood in the way, to resist Congress and the executive, alleging that the latter were overstepping their jurisdiction. In 1814 several of the New England States, where the opposition to the war then being waged with England was strongest, sent delegates to a convention at Hartford, which, while discussing the best means for putting an end to the war and restricting the powers of Congress in commercial legislation, was suspected of meditating a secession of the trading States from the Union. On the other hand, the Republicans did not hesitate to stretch to their utmost, when they were themselves in power, all the authority which the Constitution could be construed to allow to the executive and the Federal government generally.

The boldest step which a President has ever taken, the purchase from Napoleon of the vast territories of France west of the Mississippi which went by the name of Louisiana, was taken by Jefferson without the authority of Congress. Congress subsequently gave its sanction. But Jefferson and many of his friends held that under the Constitution even Congress had not the power to acquire new territories to be formed into States. They were therefore in the dilemma of either violating the Constitution or losing a golden opportunity of securing the Republic against the growth on its western frontier of a powerful and possibly hostile foreign State. Some of them tried to refute their former arguments against a lax construction of the Constitution, but many others avowed the dangerous doctrine that if Louisiana could be brought in only by breaking down the walls of the Constitution, broken they must be.

The disappearance of the Federal party between 1815 and

1820 left the Republicans masters of the field. But in the United States if old parties vanish nature quickly produces new ones. Sectional divisions soon arose among the men who joined in electing Monroe in 1820, and under the influence of the personal hostility of Henry Clay and Andrew Jackson, two great parties were again formed (about 1830), which some few years later absorbed the minor groups. One of these two parties carried on, under the name of Democrats, the dogmas and traditions of the Jeffersonian Republicans. It was the defender of States' Rights and of a restrictive construction of the Constitution; it leant mainly on the South and the farming classes generally, and it was therefore inclined to free trade. The other section, which called itself at first the National Republican, ultimately the Whig party, represented many of the views of the former Federalists, such as their advocacy of a tariff for the protection of manufactures, and of the expenditure of public money on internal improvements. It was willing to increase the army and navy, and like the Federalists found its chief, though by no means its sole support in the commercial and manufacturing parts of the country, that is to say, in New England and the Middle States.

Meantime a new question far more exciting, far more menacing, had arisen. In 1819, when Missouri applied to be admitted into the Union as a State, a sharp contest broke out in Congress as to whether slavery should be permitted within her limits, nearly all the Northern members voting against slavery, nearly all the Southern members for it. The struggle might have threatened the stability of the Union but for the compromise adopted next year, which, while admitting slavery in Missouri, forbade it for the future north of lat. 36° 30′. The danger seemed to have passed, but in its very suddenness there had been something terrible. Jefferson, then over seventy, said that it startled him "like a fire-bell in the night."

After 1840 things grew more serious, for whereas up till that time new States had been admitted substantially in pairs, a slave State balancing a free State, it began to be clear that this must shortly cease, since the remaining territory out of which new States would be formed lay north of the line 36° 30′. As every State held two seats in the Senate, the then

existing balance in that chamber between slave States and free States would evidently soon be overset by the admission of a larger number of the latter. The apprehension of this event, with its probable result of legislation unfriendly to slavery, stimulated the South to the annexation of Texas, and made them increasingly sensitive to the growth, slow as that growth was, of Abolitionist opinions at the North.

The question of the extension of slavery west of the Missouri river had become by 1850 the vital and absorbing question for the people of the United States, and as in that year California, having organized herself without slavery, was knocking at the doors of Congress for admission as a State, it had become an urgent question which evoked the hottest passions, and the victors in which would be victors all along the line. But neither of the two great parties ventured to commit itself either way. The Southern Democrats hesitated to break with those Democrats of the Northern States who sought to restrict slavery. The Whigs of the North, fearing to alienate their Southern allies by any decided action against the growing pretensions of the slave-holders, temporized and suggested compromises which practically served the cause of slavery. Anxious to save at all hazards the Union as it had hitherto stood, they did not perceive that changes of circumstances and feeling were making this effort a hopeless one, and that in trying to keep their party together they were losing hold of the people, and alienating from themselves the men who cared for principle in politics. That this was so presently appeared.

The Democratic party had by 1852 passed almost completely under the control of the slave-holders, and was adopting the dogma that Congress enjoyed under the Constitution no power to prohibit slavery in the Territories. This dogma obviously overthrew as unconstitutional the Missouri compromise of 1820. The Whig leaders discredited themselves by Henry Clay's compromise scheme of 1850, which, while admitting California as a Free State, appeased the South by the Fugitive Slave Law. They received a crushing defeat at the presidential election of 1852; and what remained of their party finally broke in pieces in 1854 over the bill for organizing Kansas as a Territory, in which the question of slaves or no slaves should

be left to the people, a bill which of course repealed the Missouri compromise.

Singularly enough, the two great orators of the party, Henry Clay and Daniel Webster, both died in 1852, wearied with strife and disappointed in their ambition of reaching the presidential chair. Together with Calhoun, who passed away two years earlier, they are the ornaments of this generation, not indeed rising to the stature of Washington or Hamilton, but more remarkable than any, save one, among the statesmen who have followed them. With them ends the second period in the annals of American parties, which, extending from about 1820 to 1856, includes the rise and fall of the Whig party. Most of the controversies which filled it have become matter for history only. But three large results, besides the general democratization of politics, stand out. One is the detachment of the United States from the affairs of the Old World. Another is the growth of a sense of National life, especially in the Northern and Western States, along with the growth at the same time of a secessionist spirit among the slave-holders. And the third is the development of the complex machinery of party organization, with the adoption of the principle on which that machinery so largely rests, that public office is to be enjoyed only by the adherents of the President for the time being.

The Whig party having begun to fall to pieces, the Democrats seemed to be for the moment, as they had been once before, left in possession of the field. But this time a new antagonist was swift to appear. The growing boldness of the slave-owners had already alarmed the Northern people, when they were startled by a decision of the Supreme Court, pronounced early in 1857 in the case of the slave Dred Scott, which laid down the doctrine that Congress had no power to forbid slavery anywhere, and that a slave-holder might carry his slaves with him whither he pleased, seeing that they were mere objects of property, whose possession the Constitution guaranteed. This completed the formation out of the wrecks of the Whigs and Know-nothings or "American party," together with the Free Soilers and "Liberty" party, of a new party, which in 1856 had run Fremont as its presidential candidate and taken the name of Republican.

At the same time an apple of discord was thrown among the Democrats. In 1860 the latter could not agree upon a candidate for President. The Southern wing pledged themselves to one man, the Northern wing to another; a body of hesitating and semi-detached politicians put forward a third. Thus the Republicans through the division of their opponents triumphed in the election of Abraham Lincoln, presently followed by the secession of eleven slave States. The Republican party, which had started by proclaiming the right of Congress to restrict slavery and had subsequently denounced the Dred Scott decision, was of course throughout the Civil War the defender of the Union and the assertor of Federal authority, stretched, as was unavoidable, to lengths previously unheard of.

When the war was over, there came the difficult task of reconstructing the now reconquered slave States, and of securing the position in them of the lately liberated Negroes. The outrages perpetrated on the latter, and on white settlers in some parts of the South, required further exertion of Federal authority, and made the question of the limit of that authority still a practical one, for the old Democratic party, almost silenced during the war, had now reappeared in full force as the advocate of State rights, and the watchful critic of any undue stretches of Federal authority. It was deemed necessary to negative the Dred Scott decision and set at rest all questions relating to slavery and to the political equality of the races by the adoption of three important amendments to the Constitution. The troubles of the South by degrees settled down as the whites regained possession of the State governments and the Northern troops began to be withdrawn. In the presidential election of 1876 the war question and Negro question had become dead issues, for it was plain that a large and increasing number of the voters were no longer, despite the appeals of the Republican leaders, seriously concerned about them.

This election marks the close of the third period, which embraces the rise and overwhelming predominance of the Republican party. Formed to resist the extension of slavery, led on to destroy it, compelled by circumstances to expand the central authority in a way unthought of before, that party had now worked out its programme and fulfilled its original mission. The old aims were accomplished, but new ones had

not yet been substituted, for though new problems had appeared, the party was not prepared with solutions. Similarly the Democratic party had discharged its mission in defending the rights of the reconstructed States, and criticising excesses of executive power; similarly it too had refused to grapple either with the fresh questions which had begun to arise since the war, or with those older questions which had now reappeared above the subsiding flood of war days. The old parties still stood as organizations, and still claimed to be the exponents of principles. Their respective principles had, however, little direct application to the questions which confronted and divided the nation.

Two permanent oppositions may, I think, be discerned running through the history of the parties, sometimes openly recognized, sometimes concealed by the urgency of a transitory question. One of these is the opposition between a centralized or unitary and a federalized government. The former has been the watchword of the Democratic party. The latter was seldom distinctly avowed, but was generally in fact represented by the Federalists of the first period, the Whigs of the second, the Republicans of the third. The other opposition, though it goes deeper and is more pervasive, has been less clearly marked in America, and less consciously admitted by the Americans themselves. It is the opposition between the tendency which makes some men prize the freedom of the individual as the first of social goods, and that which disposes others to insist on checking and regulating his impulses. The opposition of these two tendencies, the love of liberty and the love of order, is permanent and necessary, because it springs from differences in the intellect and feelings of men which one finds in all countries and at all epochs.

Each of these tendencies found among the fathers of the American Republic a brilliant and characteristic representative. Hamilton, who had a low opinion of mankind, but a gift and a passion for large constructive statesmanship, went so far in his advocacy of a strong government as to be suspected of wishing to establish a monarchy after the British pattern. Jefferson carried further than any other person set in an equally responsible place has ever done, his faith that government is either needless or an evil, and that with enough liberty, everything will go well.

CHAPTER LIII

NOMINATING CONVENTIONS

In every American election there are two acts of choice, two periods of contest. The first is the selection of the candidate from within the party by the party; the other is the struggle between the parties for the place. Frequently the former of these is more important, more keenly fought over, than the latter, for there are many districts in which the predominance of one party is so marked that its candidate is sure of success, and therefore the choice of a candidate is virtually the choice of the officer or representative.

The process for choosing and nominating a candidate is similar in every State of the Union, and through all elections to office, from the lowest to the highest, from that of common councilman for a city ward up to that of President of the United States. But, of course, the higher the office, and the larger the area over which the election extends, the greater are the efforts made to secure the nomination, and the hotter the passion it excites. The choice of a candidate for the presidency is so striking and peculiar a feature of the American system that it deserves a full examination.

Like most political institutions, the system of nominating the President by a popular convention is the result of a long process of evolution.

In the first two elections, those of 1789 and 1792, there was no need for nominations of candidates, because the whole nation wished and expected George Washington to be elected. So too, when in 1796 Washington declared his retirement, the dominant feeling of one party was for John Adams, that of the other for Thomas Jefferson, and nobody thought of setting out formally what was so generally understood.

In 1800, however, the year of the fourth election, there was somewhat less unanimity. The prevailing sentiment of the

Federalists went for re-electing Adams, and the small conclave of Federalist members of Congress which met to promote his interest was deemed scarcely necessary. The (Democratic) Republicans, however, while united in desiring to make Jefferson President, hesitated as to their candidate for the vice-presidency, and a meeting of Republican members of Congress was therefore called to recommend Aaron Burr for this office. It was a small meeting and a secret meeting, but it is memorable not only as the first congressional caucus, but as the first attempt to arrange in any way a party nomination.

In 1804 a more regular gathering for the same purpose was held. All the Republican members of Congress were summoned to meet; and they unanimously nominated Jefferson for President and George Clinton of New York for Vice-President. So in 1808 nearly all the Republican majority in both Houses of Congress met and formally nominated Madison and Clinton. The same course was followed in 1812, and again in 1816. But the objections which were from the first made to this action of the party in Congress, as being an arrogant usurpation of the rights of the people, — for no one dreamed of leaving freedom to the presidential electors, — gained rather than lost strength on each successive occasion, so much so that in 1820 the few who met made no nomination,[1] and in 1824, out of the Democratic members of both Houses of Congress summoned to the "nominating caucus," as it was called, only sixty-six attended, many of the remainder having announced their disapproval of the practice.[2] The nominee of this caucus came in only third at the polls, and this failure gave the *coup de grâce* to a plan which the levelling tendencies of the time, and the disposition to refer everything to the arbitrament of the masses, would in any case have soon extinguished. No congressional caucus was ever again held for the choice of candidates.

A new method, however, was not at once discovered. In 1828 Jackson was recommended as candidate by the legislature of Tennessee and by a number of popular gatherings in different

[1] It was not absolutely necessary to have a nomination, because there was a general feeling in favour of re-electing Monroe.

[2] The whole number was then 261, nearly all Democratic Republicans, for the Federalist party had been for some time virtually extinct.

places, while his opponents accepted, without any formal nomination, the then President, J. Q. Adams, as their candidate. In 1831, however, assemblies were held by two great parties (the Anti-Masons and the National Republicans, afterwards called Whigs) consisting of delegates from most of the States; and each of these conventions nominated its candidates for the presidency and vice-presidency. A third "National Convention" of young men, which met in 1832, adopted the Whig nominations, and added to them a series of ten resolutions, constituting the first political platform ever put forth by a nominating body. The friends of Jackson followed suit by holding their National convention, which nominated him and Van Buren. For the election of 1836, a similar convention was held by the Jacksonian Democrats, none by their opponents. But for that of 1840, National conventions of delegates from nearly all the States were held by both Democrats and Whigs, as well as by the (then young and very small) party of the Abolitionists. This precedent has been followed in every subsequent contest, so that the National nominating conventions of the great parties are now as much a part of the regular machinery of politics as are the rules which the Constitution itself prescribes for the election. The establishment of the system coincides with and represents the complete social democratization of politics in Jackson's time. It suits both the professional politicians, for whom it finds occupation and whose power it secures, and the ordinary citizen who, not having leisure to attend to politics, likes to think that his right of selecting candidates is recognized by committing the selection to delegates whom he is entitled to vote for. But the system was soon seen to be liable to fall under the control of selfish intriguers, and therefore prejudicial to the chances of able and independent men. As early as 1844 Calhoun refused to allow his name to be submitted to a nominating convention, observing that he would never have joined in breaking down the old congressional caucus had he foreseen that its successor would prove so much more pernicious.

Thus from 1789 till 1800 there were no formal nominations; from 1800 till 1824, nominations were made by congressional caucuses; from 1824 till 1840, nominations irregularly made by State legislatures and popular meetings were gradually ripening

towards the method of a special gathering of delegates from the whole country. This last plan has held its ground from 1840 till the present day, and is so exactly conformable to the political habits of the people that it is not likely soon to disappear.

Its perfection, however, was not reached at once. The early conventions were to a large extent mass meetings. The later and present ones are regularly constituted representative bodies, composed exclusively of delegates, each of whom has been duly elected at a party meeting in his own State, and brings with him his credentials.

The Constitution provides that each State shall choose as many presidential electors as it has persons representing it in Congress, *i.e.* two electors to correspond to the two senators from each State, and as many more as the State sends members to the House of Representatives.

Now in the nominating convention each State is allowed twice as many delegates as it has electoral votes. The delegates are chosen by local conventions in their several States, viz. two for each congressional district by the party convention of that district, and four for the whole State (called delegates-at-large) by the State convention. As each convention is composed of delegates from primaries, it is the composition of the primaries which determines that of the local conventions, and the composition of the local conventions which determines that of the National. To every delegate there is added a person called his "alternate," chosen by the local convention at the same time, and empowered to replace him in case he cannot be present in the National convention. If the delegate is present to vote, the alternate is silent; if from any cause the delegate is absent, the alternate steps into his shoes.

Each "State delegation" has its chairman, and is expected to keep together during the convention. It usually travels together to the place of meeting; takes rooms in the same hotel; has a recognized headquarters there; sits in a particular place allotted to it in the convention hall; holds meetings of its members during the progress of the convention to decide on the course which it shall from time to time take. These meetings, if the State be a large and doubtful one,

excite great interest, and the sharp-eared reporter prowls round them, eager to learn how the votes will go. Each State delegation votes by its chairman, who announces how his delegates vote; but if his report is challenged, the roll of delegates is called, and they vote individually. Whether the votes of a State delegation shall be given solid for the aspirant whom the majority of the delegation favours, or by the delegates individually according to their preferences, is a point which has excited bitter controversy. The present practice of the Republican party (so settled in 1876 and again in 1880) allows the delegates to vote individually, even when they have been instructed by a State convention to cast a solid vote. The Democratic party, on the other hand, sustains any such instruction given to the delegation, and records the vote of all the State delegates for the aspirant whom the majority among them approve.[1] This is the so-called Unit Rule. If, however, the State convention has not imposed the unit rule, the delegates vote individually.

For the sake of keeping up party life in the Territories and in the Federal District of Columbia, delegates from them (and now even from the Indian Territory and Alaska) are admitted to the National convention, although the Territories and District have no votes in a presidential election. Delegations of States which are known to be in the hands of the opposite party, and whose preference of one aspirant to another will not really tell upon the result of the presidential election, are admitted to vote equally with the delegations of the States sure to go for the party which holds the convention. This arrangement is justified on the ground that it sustains the interest and energy of the party in States where it is in a minority. But it permits the choice to be determined by districts whose action will in no wise affect the election itself, and the delegates from these districts are apt to belong to a lower class of politicians, and to be swayed by more motives than those who come from States where the party holds a majority.

So much for the composition of the National convention; we may now go on to describe its proceedings.

[1] An attempt was made at the Democratic Convention in Chicago in July 1884 to overset this rule, but the majority reaffirmed it.

It is held in the summer immediately preceding a presidential election, usually in June or July, the election falling in November. A large city is always chosen, in order to obtain adequate hotel accommodation and easy railroad access.

Business begins by the "calling of the convention to order" by the chairman of the National party committee. Then a temporary chairman is nominated, and, if opposed, voted on; the vote sometimes giving an indication of the respective strength of the factions present. Then the secretaries and the clerks are appointed, and the rules which are to govern the business are adopted. After this the committees, including those on credentials and resolutions, are nominated, and the convention adjourns till their report can be presented.

The next sitting usually opens, after the customary prayer, with the appointment of the permanent chairman, who inaugurates the proceedings with a speech. Then the report of the committee on resolutions (if completed) is presented. It contains what is called the platform, a long series of resolutions embodying the principles and programme of the party, which has usually been so drawn as to conciliate every section, and avoid or treat with prudent ambiguity those questions on which opinion within the party is divided. Any delegate who objects to a resolution can move to strike it out or amend it; but it is generally "sustained" in the shape it has received from the practised hands of the committee.

Next follows the nomination of aspirants for the post of party candidate. The roll of States is called, and when a State is reached to which an aspirant intended to be nominated belongs, a prominent delegate from that State mounts the platform, and proposes him in a speech extolling his merits, and sometimes indirectly disparaging the other aspirants. Another delegate seconds the nomination, sometimes a third follows; and then the roll-call goes on till all the States have been despatched, and all the aspirants nominated.[1] The average number of nominations is seven or eight; it rarely exceeds twelve.[2]

[1] Nominations may, however, be made at any subsequent time.

[2] However, in the Republican Convention of 1888, fourteen aspirants were nominated at the outset, six of whom were voted for on the last ballot. Votes were given at one or other of the ballotings for nineteen aspirants in all.

Thus the final stage is reached, for which all else has been but preparation — that of balloting between the aspirants. The clerks call the roll of States from Alabama to Wyoming, and as each is called the chairman of its delegation announces the votes, *e.g.* six for A, five for B, three for C, unless, of course, under the unit rule, the whole vote is cast for that one aspirant whom the majority of the delegation supports. When all have voted, the totals are made up and announced. If one competitor has an absolute majority of the whole number voting, according to the Republican rule, — a majority of two-thirds of the number voting, according to the Democratic rule, — he has been duly chosen, and nothing remains but formally to make his nomination unanimous. If, however, as has usually happened of late years, no one obtains the requisite majority, the roll is called again, in order that individual delegates and delegations (if the unit rule prevails) may have the opportunity of changing their votes; and the process is repeated until some one of the aspirants put forward has received the required number of votes. Sometimes many roll-calls take place.

When a candidate for the presidency has been thus found, the convention proceeds to similarly determine its candidate for the vice-presidency. The work of the convention is then complete, and votes of thanks to the chairman and other officials conclude the proceedings. The two nominees are now the party candidates, entitled to the support of the party organizations and of loyal party men over the length and breadth of the Union.

Entitled to that support, but not necessarily sure to receive it, for party discipline cannot compel an individual voter to cast his ballot for the party nominee. All that the convention can do is to recommend the candidate to the party; all that opinion can do is to brand as a kicker or bolter whoever breaks away; all that the local party organization can do is to strike the bolter off its lists. But how stands it, the reader will ask, with the delegates who have been present in the convention, have had their chance of carrying their man, and have been beaten? are they not held absolutely bound to support the candidate chosen?

This is a question which has excited much controversy. The constant impulse and effort of the successful majority have

been to impose such an obligation on the defeated minority, and the chief motive which has prevented it from being invariably formally enforced by a rule or resolution of the convention has been the fear that it might precipitate hostilities, might induce men of independent character, or strongly opposed to some particular aspirant, to refuse to attend as delegates, or to secede early in the proceedings when they saw that a person whom they disapproved was likely to win.

CHAPTER LIV

THE NOMINATING CONVENTION AT WORK

We have examined the composition of a National convention and the normal order of business in it. The more difficult task remains of describing the actual character and features of such an assembly, the motives which sway it, the temper it displays, the passions it elicits, the wiles by which its members are lured or driven to their goal.

A National convention has two objects, the formal declaration of the principles, views, and practical proposals of the party, and the choice of its candidates for the executive headship of the nation.

Of these objects the former has in critical times, such as the two elections preceding the Civil War, been of great importance. In the Democratic Convention at Charleston in 1860, a debate on resolutions led to a secession and to the break-up of the Democratic party. But of late years the adoption of platforms, drafted in a vague and pompous style by the committee, has been almost a matter of form.

The second object is of absorbing interest and importance, because the presidency is the great prize of politics, the goal of every statesman's ambition. The President can by his veto stop legislation adverse to the wishes of the party he represents. The President is the supreme dispenser of patronage.

One may therefore say that the task of a convention is to choose the party candidate. And it is a task difficult enough to tax all the resources of the host of delegates and their leaders. Who is the man fittest to be adopted as candidate? Not even a novice in politics will suppose that it is the best man, *i.e.* the wisest, strongest, and most upright. Plainly, it is the man most likely to win, the man who, to use the technical term, is most "available." What a party wants is not a good President but a good candidate. The party managers have

therefore to look out for the person likely to gain most support, and at the same time excite least opposition. Their search is rendered more troublesome by the fact that many of them, being themselves either aspirants or the close allies of aspirants, are not disinterested, and are distrusted by their fellow-searchers.

Many things have to be considered. The ability of a statesman, the length of time he has been before the people, his oratorical gifts, his "magnetism," his family connections, his face and figure, the purity of his private life, his "record" as regards integrity — all these are matters needing to be weighed. Account must be taken of the personal jealousies and hatreds which a man has excited. To have incurred the enmity of a leading statesman, of a powerful boss or ring, even of an influential newspaper, is serious. Several such feuds may be fatal.

Finally, much depends on the State whence a possible candidate comes. Local feeling leads a State to support one of its own citizens; it increases the vote of his own party in that State, and reduces the vote of the opposite party. Where the State is decidedly of one political colour, this consideration is weak. It is therefore from a doubtful State that a candidate may with most advantage be selected; and the larger the doubtful State, the better. Hence an aspirant who belongs to a great and doubtful State is *prima facie* the most eligible candidate.

Aspirants hoping to obtain the party nomination from a National convention have sometimes been divided into three classes, the two last of which, as will appear presently, are not mutually exclusive, viz. —

Favourites. Dark Horses. Favourite Sons.

A Favourite is always a politician well known over the Union, and drawing support from all or most of its sections. He is a man who has distinguished himself in Congress, or in the war, or in the politics of some State so large that its politics are matter of knowledge and interest to the whole nation. He is usually a person of conspicuous gifts, whether as a speaker, or a party manager, or an administrator.. The drawback to him is that in making friends he has also made enemies.

A Dark Horse is a person not very widely known in the

country at large, but known rather for good than for evil. He has probably sat in Congress, been useful on committees, and gained some credit among those who dealt with him in Washington. Or he has approved himself a safe and assiduous party man in the political campaigns of his own and neighbouring States, yet without reaching National prominence. Sometimes he is a really able man, but without the special talents that win popularity. Still, speaking generally, the note of the Dark Horse is respectability verging on colourlessness; and he is therefore a good sort of person to fall back upon when able but dangerous Favourites have proved impossible. That native mediocrity rather than adverse fortune has prevented him from winning fame is proved by the fact that the Dark Horses who have reached the White House, if they have seldom turned out bad Presidents, have even more seldom turned out distinguished ones.

A Favourite Son is a politician respected or admired in his own State, but little regarded beyond it. He may not be, like the Dark Horse, little known to the nation at large, but he has not fixed its eye or filled its ear. He is usually a man who has sat in the State legislature; filled with credit the post of State governor; perhaps gone as senator or representative to Washington, and there approved himself an active promoter of local interests. Probably he possesses the qualities which gain local popularity, — geniality, activity, sympathy with the dominant sentiment and habits of his State; or, while endowed with gifts excellent in their way, he has lacked the audacity and tenacity which push a man to the front through a jostling crowd. More rarely he is a demagogue who has raised himself by flattering the masses of his State on some local questions, or a skilful handler of party organizations who has made local bosses and spoilsmen believe that their interests are safe in his hands. Anyhow, his personality is such as to be more effective with neighbours than with the nation, as a lamp whose glow fills the side chapel of a cathedral sinks to a spark of light when carried into the nave.

A Favourite Son may be also a Dark Horse; that is to say, he may be well known in his own State, but so little known out of it as to be an unlikely candidate. But he need not be. The types are different, for as there are Favourite Sons whom the

nation knows but does not care for, so there are Dark Horses whose reputation, such as it is, has not been made in State affairs, and who rely but very little on State favour.

There are seldom more than two, never more then three Favourites in the running at the same convention. Favourite Sons are more numerous — it is not uncommon to have four or five, or even six, though perhaps not all these are actually started in the race. The number of Dark Horses is practically unlimited, because many talked of beforehand are not actually started, while others not considered before the convention begins are discovered as it goes on.

To carry the analysis farther, it may be observed that four sets of motives are at work upon those who direct or vote in a convention, acting with different degrees of force on different persons. There is the wish to carry a particular aspirant. There is the wish to defeat a particular aspirant, a wish sometimes stronger than any predilection. There is the desire to get something for one's self out of the struggle — *e.g.* by trading one's vote or influence for the prospect of a Federal office. There is the wish to find the man who, be he good or bad, friend or foe, will give the party its best chance of victory. These motives cross one another, get mixed, vary in relative strength from hour to hour as the convention goes on and new possibilities are disclosed. To forecast their joint effect on the minds of particular persons and sections of a party needs wide knowledge and eminent acuteness. To play upon them is a matter of the finest skill.

The proceedings of a nominating convention can be best understood by regarding the three periods into which they fall; the transactions which precede the opening of its sittings; the preliminary business of passing rules and resolutions and delivering the nominating speeches; and, finally, the balloting.

A President has scarcely been elected before the newspapers begin to discuss his probable successor. Little, however, is done towards the ascertainment of candidates till about a year before the next election, when the factions of the chief aspirants prepare to fall into line, newspapers take up their parable in favour of one or other, and bosses begin the work of "subsoiling," *i.e.* manipulating primaries and local conventions so as to secure the choice of such delegates to the next National

convention as they desire. In most of the conventions which appoint delegates, the claims of the several aspirants are canvassed, and the delegates chosen are usually chosen in the interest of one particular aspirant. The newspapers, with their quick sense of what is beginning to stir men's thoughts, redouble their advocacy, and the "boom" of one or two of the probable favourites is thus fairly started. Before the delegates leave their homes for the National convention, most of them have fixed on their candidate, many having indeed received positive instructions as to how their vote shall be cast. All appears to be spontaneous, but in reality both the choice of particular men as delegates, and the instructions given, are usually the result of untiring underground work among local politicians, directed, or even personally conducted, by two or three skilful agents and emissaries of a leading aspirant, or of the knot which seeks to run him.

Four or five days before the day fixed for the opening of the convention the delegations begin to flock into the city where it is to be held. Some come attended by a host of friends and camp-followers, and are received at the depôt (railway terminus) by the politicians of the city, with a band of music and an admiring crowd.

Before the great day dawns many thousands of politicians, newspaper men, and sight-seers have filled to overflowing every hotel in the city, and crowded the main thoroughfares so that the horse-cars can scarcely penetrate the throng. When the chief delegations have arrived, the work begins in earnest. Not only each large delegation, but the faction of each leading aspirant to the candidacy, has its headquarters, where the managers hold perpetual session, reckoning up their numbers, starting rumours meant to exaggerate their resources and dishearten their opponents, organizing raids upon the less experienced delegates as they arrive. Some fill the entrance halls and bars of the hotels, talk to the busy reporters, extemporize meetings with tumultuous cheering for their favourite. Meanwhile, the more skilful leaders begin (as it is expressed) to "plough around" among the delegations of the newer States, often more malleable, because they come from regions where the strength of the factions supporting the various aspirants is less accurately known, and are themselves more easily "capt-

ured" by bold assertions or seductive promises. Sometimes an expert intriguer will "break into" one of these wavering delegations, and make havoc like a fox in a hen-roost. "Missionaries" are sent out to bring over individuals; embassies are accredited from one delegation to another to endeavour to arrange combinations by coaxing the weaker party to drop its own aspirant, and add its votes to those of the stronger party. All is conducted with perfect order and good-humour, for the least approach to violence would recoil upon its authors; and the only breach of courtesy is where a delegation refuses to receive the ambassadors of an organization whose evil fame has made it odious.

It is against etiquette for the aspirants themselves to appear upon the scene, whether from some lingering respect for the notion that a man must not ask the people to choose him, but accept the proffered honour, or on the principle that the attorney who conducts his own case has a fool for a client. But from Washington, if he is an official or a senator, or perhaps from his own home in some distant State, each aspirant keeps up hourly communication with his managers in the convention city, having probably a private wire laid on for the purpose. Not only may officials, including the President himself, become aspirants, but Federal office-holders may be, and very largely are, delegates.

As the hour when the convention is to open approaches, each faction strains its energy to the utmost. The larger delegations hold meetings to determine their course in the event of the man they chiefly favour proving "unavailable." Conferences take place between different delegations. Lists are published in the newspapers of the strength of each aspirant. Sea and land are compassed to gain one influential delegate, who "owns" other delegates.

At length the period of expectation and preparation is over, and the summer sun rises upon the fateful day to which every politician in the party has looked forward for three years. Long before the time (usually 11 A.M.) fixed for the beginning of business, every part of the hall, erected specially for the gathering — a hall often large enough to hold from ten to fifteen thousand persons — is crowded.[1] The delegates — who

[1] Admission is of course by ticket, and the prices given for tickets to those who having obtained them, sell them, run high, up to $30, or even $50.

in 1896 were 924 in the Republican Convention and 934 in the Democratic — are a mere drop in the ocean of faces. Eminent politicians from every State of the Union, senators and representatives from Washington not a few, journalists and reporters, ladies, sight-seers from distant cities, as well as a swarm of partisans from the city itself, press in; some semblance of order being kept by the sergeant-at-arms and his marshals. Some wear devices, sometimes the badge of their State, or of their organization; sometimes the colours or emblem of their favourite aspirant. Each State delegation has its allotted place marked by the flag of the State floating from a pole; but leaders may be seen passing from one group to another, while the spectators listen to the band playing popular airs, and cheer any well-known figure that enters.

When the assembly is "called to order," a prayer is offered — each day's sitting begins with a prayer by some clergyman of local eminence, the susceptibilities of various denominations being duly respected in the selection — and business proceeds according to the order described in last chapter. First come the preliminaries, appointment of committees and chairmen, then the platform, and probably on the second day, but perhaps later, the nominations and balloting, the latter sometimes extending over several days. There is usually both a forenoon and an afternoon session.

The convention presents in sharp contrast and frequent alternation the two most striking features of American meetings — their orderliness and their excitability. Everything is done according to strict rule, with a scrupulous observance of small formalities. Points of order almost too fine for a parliament are taken, argued, decided on by the chair, to whom every one bows. Yet the passions that sway the multitude are constantly bursting forth in storms of cheering or hissing at an allusion to a favourite aspirant or an obnoxious name, and five or six speakers often take the floor together, shouting and gesticulating at each other till the chairman obtains a hearing for one of them. Of course it depends on the chairman whether or no the convention sinks into a mob. A chairman with a weak voice, or a want of prompt decision, or a suspicion of partisanship, may bring the assembly to the verge of disaster, and it has more than once happened that when the

confusion that prevailed would have led to an irregular vote which might have been subsequently disputed, the action of the manager acting for the winning horse has, by waiving some point of order or consenting to an adjournment, saved the party from disruption. Even in the noisiest scenes the singular good sense and underlying love of fair play — fair play according to the rules of the game, which do not exclude some dodges repugnant to an honourable man — will often reassert itself, and pull back the vehicle from the edge of the precipice.

The chief interest of the earlier proceedings lies in the indications which speeches and voting give of the relative strength of the factions. Sometimes a division on the choice of a chairman, or on the adoption of a rule, reveals the tendencies of the majority, or of influential leaders, in a way which sends the chances of an aspirant swiftly up or down the barometer of opinion. So when the nominating speeches come, it is not so much their eloquence that helps a nominee as the warmth with which the audience receives them, the volume of cheering and the length of time, sometimes fifteen minutes, during which the transport lasts. The rhetoric is usually pompous and impassioned. To read a speech, even a short speech, from copious notes, is neither irregular nor rare.

While forenoon and evening, perhaps even late evening, are occupied with the sittings of the convention, canvassing and intrigue go on more briskly than ever during the rest of the day and night. Conferences are held between delegations anxious to arrange for a union of forces on one candidate. Divided delegations hold meetings of their own members, meetings often long and stormy, behind closed doors, outside which a curious crowd listens to the angry voices within, and snatches at the reports which the dispersing members give of the result. Sometimes the whole issue of the convention hinges on the action of the delegates of a great State, which, like New York, under the unit rule, can throw seventy-two votes into the trembling scale.

As it rarely happens that any aspirant is able to command at starting a majority of the whole convention, the object of each is to arrange a combination whereby he may gather from the supporters of other aspirants votes sufficient to make up

the requisite majority, be it two-thirds, according to the Democratic rule, or a little more than a half, according to the Republican. Let us take the total number of votes at 820 — the figure in 1888. There are usually two aspirants commanding each from 230 to 330; one or two others with from 50 to 100, and the rest with much smaller figures, 10 to 30 each. A combination can succeed in one of two ways: (*a*) One of the stronger aspirants may pick up votes, sometimes quickly, sometimes by slow degrees, from the weaker candidates, sufficient to overpower the rival Favourite; (*b*) each of the strongest aspirants may hold his forces so well together that after repeated balloting it becomes clear that neither can win against the resistance of the other. Neither faction will, however, give way, because there is usually bitterness between them, because each would feel humiliated, and because each aspirant has so many friends that his patronage will no more than suffice for the clients to whom he is pledged already. Hence one or other of the baffled Favourites suddenly transfers the votes he commands to some one of the weaker men, who then so rapidly "develops strength" that the rest of the minor factions go over to him, and he obtains the requisite majority. Experience has so well prepared the tacticians for one or other of these issues that the game is always played with a view to them. The first effort of the managers of a Favourite is to capture the minor groups of delegates who support one or other of the Favourite Sons and Dark Horses. Not till this proves hopeless do they decide to sell themselves as dear as they can by taking up and carrying to victory a Dark Horse or perhaps even a Favourite Son, thereby retaining the pleasure of defeating the rival Favourite, while at the same time establishing a claim for themselves and their faction on the aspirant whom they carry.

It may be asked why a Dark Horse often prevails against the Favourites, seeing that either of the latter has a much larger number of delegates in his favour. Ought not the wish of a very large group to have so much weight with the minor groups as to induce them to come over and carry the man whom a powerful section of the party obviously desires? The reason why this does not happen is that a Favourite is often as much hated by one strong section as he is liked by another, and if

the hostile section is not strong enough to keep him out by its unaided vote, it is sure to be able to do so by transferring itself to some other aspirant. Moreover, a Favourite has often less chance with the minor groups than a Dark Horse may have. He has not the charm of novelty. His "ins and outs" are known; the delegations weighed his merits before they left their own State, and if they, or the State convention that instructed them, decided against him then, they are slow to adopt him now. They have formed a habit of "antagonizing" him, whereas they have no hostility to some new and hitherto inconspicuous aspirant.

Let us now suppose resolutions and nominating speeches despatched, and the curtain raised for the third act of the convention. The chairman raps loudly with his gavel, announcing the call of States for the vote. A hush falls on the multitude, a long deep breath is drawn, tally books are opened and pencils grasped, while the clerk reads slowly the names of State after State. As each is called, the chairman of its delegation rises and announces the votes it gives, bursts of cheering from each faction in the audience welcoming the votes given to the object of its wishes. Inasmuch as the disposition of most of the delegates has become known beforehand, not only to the managers, but to the public through the press, the loudest welcome is given to a delegate or delegation whose vote turns out better than had been predicted.

In the first scene of this third and decisive act the Favourites have, of course, the leading parts. Their object is to produce an impression of overwhelming strength, so the whole of this strength is displayed, unless, as occasionally happens, an astute manager holds back a few votes. This is also the bright hour of the Favourite Sons. Each receives the vote of his State, but each usually finds he has little to expect from external help, and his friends begin to consider into what other camp they had better march over. The Dark Horses are in the background, nor is it yet possible to say which (if any) of them will come to the front.

The first ballot seldom decides much, yet it gives a new aspect to the battle-field, for the dispositions of some groups of voters who had remained doubtful is now revealed, and the managers of each aspirant are better able to tell, from the way

in which delegations are divided, in what quarters they are most likely to gain or lose votes on the subsequent ballots. They whisper hastily together, and try, in the few moments they have before the second ballot is upon them, to prepare some new line of defence or attack.

The second ballot, taken in the same way, sometimes reveals even more than the first. The smaller and more timid delegations, smitten with the sense of their weakness, despairing of their own aspirant, and anxious to be on the winning side, begin to give way; or if this does not happen on the second ballot, it may do so on the third. Rifts open in their ranks, individuals or groups of delegates go over to one of the stronger candidates, some having all along meant to do so, and thrown their first vote merely to obey instructions received or fulfil the letter of a promise given. The gain of even twenty or thirty votes for one of the leading candidates over his strength on the preceding ballot so much inspirits his friends, and is so likely to bring fresh recruits to his standard, that a wily manager will often, on the first ballot, throw away some of his votes on a harmless antagonist that he may by rallying them increase the total of his candidate on the second, and so convey the impression of growing strength.

The breathing space between each ballot and that which follows is used by the managers for hurried consultations. Aides-de-camp are sent to confirm a wavering delegation, or to urge one which has been supporting a now hopeless aspirant to seize this moment for dropping him and coming over to the winning standard. Or the aspirant himself, who, hundreds of miles away, sits listening to the click of the busy wires, is told how matters stand, and asked to advise forthwith what course his friends shall take. Forthwith it must be, for the next ballot is come, and may give the battle-field a new aspect, promising victory or presaging irretrievable defeat.

One balloting follows another till what is called "the break" comes. It comes when the weaker factions, perceiving that the men of their first preference cannot succeed, transfer their votes to that one among the aspirants whom they like best, or whose strength they see growing. When the faction of one aspirant has set the example, others are quick to follow, and thus it may happen that after thirty or

forty ballots have been taken with few changes of strength as between the two leading competitors, a single ballot, once the break has begun, and the column of one or both of these competitors has been "staggered," decides the battle.

If one Favourite is much stronger from the first than any other, the break may come soon and come gently, *i.e.* each ballot shows a gain for him on the preceding ballot, and he marches so steadily to victory that resistance is felt to be useless. But if two well-matched rivals have maintained the struggle through twenty or thirty ballots, so that the long strain has wrought up all minds to unwonted excitement, the break, when it comes, comes with fierce intensity, like that which used to mark the charge of the Old Guard. The defeat becomes a rout. Battalion after battalion goes over to the victors, while the vanquished, ashamed of their candidate, try to conceal themselves by throwing away their colours and joining in the cheers that acclaim the conqueror. In the picturesquely technical language of politicians, it is a stampede.

To stampede a convention is the steadily contemplated aim of every manager who knows he cannot win on the first ballot. Sometimes it comes of itself, when various delegations, smitten at the same moment by the sense that one of the aspirants is destined to conquer, go over to him all at once.[1] Sometimes it is due to the action of the aspirant himself. In 1880 Mr. Blaine, who was one of the two leading Favourites, perceiving that he could not be carried against the resistance of the Grant men, suddenly telegraphed to his friends to transfer their votes to General Garfield, till then a scarcely considered candidate. In 1884 General Logan, also by telegraph, turned over his votes to Mr. Blaine between the third and fourth ballot, thereby assuring the already probable triumph of that Favourite.

When a stampede is imminent, only one means exists of averting it,— that of adjourning the convention so as to stop the panic and gain time for a combination against the winning aspirant. A resolute manager always tries this device, but he seldom succeeds, for the winning side resists the motion for adjournment, and the vote which it casts on that issue is practically a vote for its aspirant, against so much of the field

[1] Probably a Dark Horse, for the Favourite Sons, having had their turn in the earlier ballotings, have been discounted; and are apt to excite more jealousy among the delegates of other States.

as has any fight left in it. This is the most critical and exciting moment of the whole battle. A dozen speakers rise at once, some to support, some to resist the adjournment, some to protest against debate upon it, some to take points of order, few of which can be heard over the din of the howling multitude. Meanwhile, the managers who have kept their heads rush swiftly about through friendly delegations, trying at this supreme moment to rig up a combination which may resist the advancing tempest. Tremendous efforts are made to get the second Favourite's men to abandon their chief and "swing into line" for some Dark Horse or Favourite Son, with whose votes they may make head till other factions rally to them.

> "In vain, in vain, the all-consuming hour
> Relentless falls — "

The battle is already lost, the ranks are broken and cannot be rallied, nothing remains for brave men but to cast their last votes against the winner and fall gloriously around their still waving banner. The motion to adjourn is defeated, and the next ballot ends the strife with a hurricane of cheering for the chosen leader. Then a sudden calm falls on the troubled sea. What is done is done, and whether done for good or for ill, the best face must be put upon it. Accordingly, the proposer of one of the defeated aspirants moves that the nomination be made unanimous, and the more conspicuous friends of other aspirants hasten to show their good-humour and their loyalty to the party as a whole by seconding this proposition. Then, perhaps, a gigantic portrait of the candidate, provided by anticipation, is hoisted up, a signal for fresh enthusiasm, or a stuffed eagle is carried in procession round the hall.

Nothing further remains but to nominate a candidate for the vice-presidency, a matter of small moment now that the great issue has been settled. This nomination is frequently used to console one of the defeated aspirants for the presidential nomination, or is handed over to his friends to be given to some politician of their choice. If there be a contest, it is seldom prolonged beyond two or three ballots. The convention is at an end, and in another day the whole host of exhausted delegates and camp-followers, hoarse with shouting, is streaming home along the railways.

CHAPTER LV

HOW PUBLIC OPINION RULES IN AMERICA

Of all the experiments which America has made, this endeavouring to govern by public opinion is that which best deserves study, for her solution of the problem differs from all previous solutions, and she has shown more boldness in trusting public opinion, in recognizing and giving effect to it, than has yet been shown elsewhere. Towering over Presidents and State governors, over Congress and State legislatures, over conventions and the vast machinery of party, public opinion stands out, in the United States, as the great source of power, the master of servants who tremble before it.

Congress sits for two years only. It is strictly limited by the Constitution, and by the coexistence of the State governments, which the Constitution protects. It has (except by way of impeachment) no control over the Federal executive, which is directly named by and responsible to the people. So, too, the State legislatures sit for short periods, do not appoint the State executives, are hedged in by the prohibitions of the State constitutions. The people frequently legislate directly by enacting or altering a constitution. The only check on the mass is that which they have themselves imposed, and which the ancient democracies did not possess, the difficulty of changing a rigid constitution. And this difficulty is serious only as regards the Federal Constitution.

As this is the most developed form of popular government, so is it also the form which most naturally produces what I have called government by public opinion. Popular government may be said to exist wherever all power is lodged in and issues from the people. Government by public opinion exists where the wishes and views of the people prevail, even before they have been conveyed through the regular law-appointed organs, and without the need of their being so conveyed.

Where the power of the people is absolute, legislators and administrators are quick to catch its wishes in whatever way they may be indicated, and do not care to wait for the methods which the law prescribes. This happens in America.

A consideration of the nature of the State governments, as of the National government, will show that legal theory as well as popular self-confidence gives birth to this rule of opinion. Supreme power resides in the whole mass of citizens. They have prescribed, in the strict terms of a legal document, the form of government. They alone have the right to change it, and that only in a particular way. They have committed only a part of their sovereignty to their executive and legislative agents, reserving the rest to themselves. Hence their will, or, in other words, public opinion, is constantly felt by these agents to be, legally as well as practically, the controlling authority. In England, Parliament is the nation, not merely by a legal fiction, but because the nation looks to Parliament only, having neither reserved any authority to itself nor bestowed any elsewhere. In America, Congress is not the nation, and does not claim to be so.

The ordinary functions and business of government, the making of laws, the imposing of taxes, the interpretation of laws and their execution, the administration of justice, the conduct of foreign relations, are parcelled out among a number of bodies and persons whose powers are so carefully balanced and touch at so many points that there is a constant risk of conflicts, even of deadlocks. Some of the difficulties thence arising are dealt with by the courts, as questions of the interpretation of the Constitution. But in many cases the intervention of the courts, which can act only in a suit between parties, comes too late to deal with the matter, which may be an urgent one; and in some cases there is nothing for the courts to decide, because each of the conflicting powers is within its legal right. The Senate, for instance, may refuse the measures which the House thinks necessary. The President may veto bills passed by both Houses, and there may not be a two-thirds majority to pass them over his veto. Congress may urge the President to take a certain course, and the President may refuse. The President may propose a treaty to the Senate, and the Senate may reject it. In such cases there is a stoppage of govern-

mental action which may involve loss to the country. The master, however, is at hand to settle the quarrels of his servants. If the question be a grave one, and the mind of the country clear upon it, public opinion throws its weight into one or other scale, and its weight is decisive. Should opinion be nearly balanced, it is no doubt difficult to ascertain, till the next election arrives, which of many discordant cries is really the prevailing voice. This difficulty must, in a large country, where frequent plebiscites are impossible, be endured; and it may be well, when the preponderance of opinion is not great, that serious decisions should not be quickly taken. The general truth remains that a system of government by checks and balances specially needs the presence of an arbiter to incline the scale in favour of one or other of the balanced authorities, and that public opinion must therefore be more frequently invoked and more constantly active in America than in other countries.

Those who invented this machinery of checks and balances were anxious not so much to develop public opinion as to resist and build up breakwaters against it. No men were less revolutionary in spirit than the founders of the American Constitution. They had made a revolution in the name of Magna Charta and the Bill of Rights : they were penetrated by a sense of the dangers incident to democracy. They conceived of popular opinion as aggressive, unreasoning, passionate, futile, and a breeder of mob violence. We shall presently inquire whether this conception has been verified. Meantime be it noted that the efforts made in 1787 to divide authority and, so to speak, force the current of the popular will into many small channels instead of permitting it to rush down one broad bed, have really tended to exalt public opinion above the regular legally appointed organs of government. Each of these organs is too small to form opinion, too narrow to express it, too weak to give effect to it. It grows up not in Congress, not in State legislatures, not in those great conventions which frame platforms and choose candidates, but at large among the people. It is expressed in voices everywhere. It rules as a pervading and impalpable power, like the ether which passes through all things. It binds all the parts of the complicated system together, and gives them whatever unity of aim and action they possess.

In the United States public opinion is the opinion of the whole nation, with little distinction of social classes. The politicians, including the members of Congress and of State legislatures, are, perhaps, not (as Americans sometimes insinuate) below, yet certainly not above the average level of their constituents. They find no difficulty in keeping touch with outside opinion. Washington or Albany may corrupt them, but not in the way of modifying their political ideas. They do not aspire to the function of forming opinion. They are like the Eastern slave who says, "I hear and obey." Nor is there any one class or set of men, or any one "social layer," which more than another originates ideas and builds up political doctrine for the mass. The opinion of the nation is the resultant of the views, not of a number of classes, but of a multitude of individuals, diverse, no doubt, from one another, but, for the purposes of politics far less diverse than if they were members of groups defined by social rank or by property.

The consequences are noteworthy. Statesmen cannot, as in Europe, declare any sentiment which they find telling on their friends or their antagonists to be confined to the rich, or to the governing class, and to be opposed to the general sentiment of the people. In America you cannot appeal from the classes to the masses. What the employer thinks, his workmen think.[1] What the wholesale merchant feels, the retail storekeeper feels, and the poorer customers feel. Divisions of opinion are vertical and not horizontal. Obviously this makes opinion more easily ascertained, while increasing its force as a governing power, and gives to the whole people, without distinction of classes, a clearer and fuller consciousness of being the rulers of their country than European peoples have. Every man knows that he is himself a part of the government, bound by duty as well as by self-interest to devote part of his time and thoughts to it. He may neglect this duty, but he admits it to be a duty. So the system of party organizations already described is built upon this theory; and as this system is more recent, and is the work of practical politicians, it is even better evidence of the general acceptance of the doctrine than are the provisions of constitutions.

[1] Of course I do not include questions specially relating to labour, in which there may be a direct conflict of interests.

CHAPTER LVI

THE ACTION OF PUBLIC OPINION

In the United States there are comparatively few persons who devote themselves to constant thinking about public affairs and endeavouring to form the opinion of the nation. There is also a smaller proportion than in European countries, such as England or France or Germany, of persons who do not care about politics at all, and so have really no political opinions even when they vote. Between the few who think steadily and those who hardly think at all on political subjects stands the great mass of the nation. It is by and among them rather than by and among the small class constantly occupied with those subjects that opinion is formed as well as tested, created as well as moulded. Political light and heat do not radiate out from a centre as in England. They are diffused all through the atmosphere, and are little more intense in the inner sphere of practical politicians than elsewhere. The ordinary citizens are interested in politics, and watch them with intelligence, the same kind of intelligence (though a smaller quantity of it) as they apply to their own business. They are forced by incessant elections to take a more active part in public affairs than is taken by any European people. They think their own competence equal to that of their representatives and office-bearers; and they are not far wrong. They do not therefore look up to their statesmen for guidance, but look around to one another, carrying to its extreme the principle that in the multitude of counsellors there is wisdom.

In America, therefore, opinion is not made but grows. Of course it must begin somewhere; but it is often hard to say where or how. As there are in the country a vast number of minds similar in their knowledge, beliefs, and attitude, with few exceptionally powerful minds applying themselves to politics, it is natural that the same idea should often occur to

several or many persons at the same time, that each event as it occurs should produce the same impression and evoke the same comments over a wide area. When everybody desires to agree with the majority, and values such accord more highly than the credit of originality, this tendency is all the stronger. An idea once launched, or a view on some current question propounded, flies everywhere on the wings of a press eager for novelties. Publicity is the easiest thing in the world to obtain; but as it is attainable by all notions, phrases, and projects, wise and foolish alike, the struggle for existence — that is to say, for public attention — is severe.

Here, of course, as everywhere else in the world, some one person or group must make a beginning, but, whereas in Europe men can generally note who does make the beginning, in America a view often seems to arise spontaneously, and to be the work of many rather than of few. The individual counts for less, the mass counts for more. In propagating a doctrine not hitherto advocated by any party, the methods used are similar to those of the old country. A central society is formed, branch societies spring up over the country, a journal (perhaps several journals) is started, and if the movement thrives, an annual convention of its supporters is held, at which speeches are made and resolutions adopted. If any striking personality is connected with the movement as a leader, he cannot but become a sort of figure-head. Yet it happens more rarely in America than in England that an individual leader gives its character to a movement, partly because new movements less often begin among, or are taken up by, persons already known as practical politicians.

As regards opinion on the main questions of the hour, such as the extension of slavery long was, and civil service reform, the currency, the tariff, are now, it rises and falls, much as in any other country, under the influence of events which seem to make for one or the other of the contending views. There is this difference between America and Europe, that in the former speeches seem to influence the average citizen less, because he is more apt to do his own thinking; newspaper invective less, because he is used to it; current events rather more, because he is better informed of them. Party spirit is probably no stronger in America than in England, so far as

a man's thinking and talking go, but it tells more upon him when he comes to vote.

An illustration of what has been said may be found in the fact that the proportion of persons who actually vote at an election to those whose names appear on the voting list is larger in America than in Europe. In some English constituencies this percentage does not exceed 60 per cent, though at exciting moments it is larger than this, taking the country as a whole. At the hotly contested general election of 1892 it reached 77 per cent. In America 80 per cent may be a fair average in presidential elections, which call out the heaviest vote, and in 1880 and 1892 this proportion was exceeded. Something may be ascribed to the more elaborate local organization of American parties; but against this ought to be set the fact that the English voting mass includes not quite two-thirds, the American nearly the whole, of the adult male population.

We may now go on to inquire in what manner opinion, formed or forming, is able to influence the conduct of affairs?

The legal machinery through which the people are by the Constitution (Federal and State) invited to govern is that of elections. Occasionally, when the question of altering a State constitution comes up, the citizen votes directly for or against a proposition put to him in the form of a constitutional amendment; but otherwise it is only by voting for a man as candidate that he can give expression to his views, and directly support or oppose some policy. Now, in every country voting for a man is an inadequate way of expressing one's views of policy, because the candidate is sure to differ in one or more questions from many of those who belong to the party. It is especially inadequate in the United States, because the strictness of party discipline leaves little freedom of individual thought or action to the member of a legislature, because the ordinary politician has little interest in anything but the regular party programme, and because in no party are the citizens at large permitted to select their candidate, seeing that he is found for them and forced on them by the professionals of the party organization. While, therefore, nothing is easier than for opinion which runs in the direct channel of party to give effect to itself frequently and vigorously, nothing is harder

than for opinion which wanders out of that channel to find a legal and regular means of bringing itself to bear upon those who govern either as legislators or executive officers. This is the weak point of the American party system, perhaps of every party system, from the point of view of the independent-minded citizen, as it is the strong point from that of the party manager. A body of unorganized opinion is, therefore, helpless in the face of compact parties. It is obliged to organize. When organized for the promotion of a particular view or proposition, it has in the United States three courses open to it.

The first is to capture one or other of the great standing parties, *i.e.* to persuade or frighten that party into adopting this view as part of its programme, or, to use the technical term, making it a plank of the platform, in which case the party candidates will be bound to support it. This is the most effective course, but the most difficult; for a party is sure to have something to lose as well as to gain by embracing a new dogma.

The second course is for the men who hold the particular view to declare themselves a new party, put forward their own programme, run their own candidates. Besides being costly and troublesome, this course would be thought ridiculous where the view or proposition is not one of first-rate importance, which has already obtained wide support. Where, however, it is applicable, it is worth taking, even when the candidates cannot be carried, for it serves as an advertisement, and it alarms the old party, from which it withdraws voting strength in the persons of the dissidents.

The third is to cast the voting weight of the organized promoters of the doctrine or view in question into the scale of whichever party shows the greatest friendliness, or seems most open to conversion. As in many States the regular parties are pretty equally balanced, even a comparatively weak body of opinion may decide the result. Such a body does not necessarily forward its own view, for the candidates whom its vote carries are nowise pledged to its programme. But it has made itself felt, shown itself a power to be reckoned with, improved its chances of capturing one or other of the regular parties, or of running candidates of its own on some future occasion.

When this transfer of the solid vote of a body of agitators is the result of a bargain with the old party which gets the vote, it is called "selling out;" and in such cases it sometimes happens that the bargain secures one or two offices for the incoming allies in consideration of the strength they have brought. But if the new group be honestly thinking of its doctrines and not of the offices, the terms it will ask will be the nomination of good candidates, or a more friendly attitude towards the new view.

The third course is applicable wherever the discipline of the section which has arisen within a party is so good that its members can be trusted to break away from their former affiliation, and vote solid for the side their leaders have agreed to favour. It is a potent weapon, and liable to be abused. But in a country where the tide runs against minorities and small groups, it is most necessary. The possibility of its employment acts as a check on the regular parties, disposing them to abstain from legislation which might irritate any body of growing opinion and tend to crystallize it as a new organization, and making them more tolerant of minor divergences from the dogmas of the orthodox programme than their fierce love of party uniformity would otherwise permit.

So far we have been considering the case of persons advocating some specific opinion or scheme. As respects the ordinary conduct of business by officials and legislators, the fear of popular displeasure to manifest itself at the next election is, of course, the most powerful of restraining influences. Under a system of balanced authorities, such fear helps to prevent or remove deadlocks as well as the abuse of power by any one authority. A President (or State governor) who has vetoed bills passed by Congress (or his State legislature) is emboldened to go on doing so when he finds public opinion on his side; and Congress (or the State legislature) will hesitate, though the requisite majority may be forthcoming, to pass these bills over the veto. A majority in the House of Representatives, or in a State legislative body, which has abused the power of closing debate by the "previous question" rule, may be frightened by expressions of popular disapproval from repeating the offence. When the two branches of a legislature differ, and a valuable bill has failed, or when there has

been vexatious filibustering, public opinion fixes the blame on the party primarily responsible for the loss of good measures or public time, and may punish it at the next election. Mischief is checked in America more frequently than anywhere else by the fear of exposure, or by newspaper criticisms on the first stage of a bad scheme. And, of course, the frequency of elections — in most respects a disadvantage to the country — has the merit of bringing the prospect of punishment nearer.

It will be asked how the fear is brought home, seeing that the result of a coming election must usually be uncertain. Sometimes it is not brought home. The erring majority in a legislature may believe they have the people with them, or the governor may think his jobs will be forgotten. Generally, however, there are indications of the probable set of opinion in the language held by moderate men and the less partisan newspapers. When some of the organs of the party which is in fault begin to blame it, danger is in the air, for the other party is sure to use the opening thus given to it. And hence, of course, the control of criticism is most effective where parties are nearly balanced. Opinion seems to tell with special force when the question is between a legislative body passing bills or ordinances, and a president or governor, or mayor, vetoing them, the legislature recoiling whenever they think the magistrate has got the people behind him. Even small fluctuations in a vote produce a great impression on the minds of politicians.

These defects which may be noted in the constitutional mechanism for enabling public opinion to rule promptly and smoothly, are, in a measure, covered by the expertness of Americans in using all kinds of voluntary and private agencies for the diffusion and expression of opinion. Where the object is to promote some particular cause, associations are formed and federated to one another, funds are collected, the press is set to work, lectures are delivered. When the law can profitably be invoked (which is often the case in a country governed by constitutions standing above the legislature), counsel are retained and suits instituted, all with the celerity and skill which long practice in such work has given. If the cause has a moral bearing, efforts are made to enlist the religious or semi-

religious magazines and the ministers of religion.[1] Deputations proceed to Washington or to the State capital, and lay siege to individual legislators. Sometimes a distinct set of women's societies is created, whose action on and through women is all the more powerful because the deference shown to the so-called weaker sex enables them to do what would be resented in men. Not long ago, I think in Iowa, when a temperance ticket was being run at the elections, parties of ladies gathered in front of the polling booths and sang hymns all day while the citizens voted. Every one remembers the "Women's Temperance Crusade," when, in several Western States, bands of women entered the drinking saloons and, by entreaties and reproaches, drove out the customers. In no country has any sentiment which touches a number of persons so many ways of making itself felt; though, to be sure, when the first and chief effort of every group is to convince the world that it is strong, and growing daily stronger, great is the difficulty of determining whether those who are vocal are really numerous or only noisy.

For the promotion of party opinion on the leading questions that divide or occupy parties, there exist, of course, the regular party organizations. Opinion is, however, the thing with which this mechanism is at present least occupied. Its main objects are the selection of the party candidates and the conduct of the canvass at elections. Traces of the other purpose remain in the practice of adopting, at State and National conventions, a platform, or declaration of principles and views, which is the electoral manifesto of the party, embodying the tenets which it is supposed to live for. When any important election comes off, the party organization sends its speakers out on stumping tours, and distributes a flood of campaign literature. At other times opinion moves in a different plane from that of party machinery, and is scarcely affected by it.

In Europe the persons who move in the inner sphere of politics, give unbroken attention to political problems, always discussing them both among themselves and before the people. As the corresponding persons in America are not organized into a class, and to some extent not engaged in practical politics,

[1] In Philadelphia, during a struggle against the City Boss, the clergy were requested to preach election sermons.

the work of discussion has been left to be done, in the three "off years," by the journalists and a few of the more active and thoughtful statesmen, with casual aid from such private citizens as may be interested. Now many problems require uninterrupted and what may be called scientific or professional study. Foreign policy obviously presents such problems. Of foreign policy America has usually little occasion to think, but some of her domestic difficulties are such as to demand that careful observation and unbroken reflection which neither her executive magistrates, nor her legislatures, nor any leading class among her people now give.

Those who know the United States and have been struck by the quantity of what is called politics there, may think that this description underrates the volume and energy of public political discussion. I admit the endless hubbub, the constant elections in one district or another, the paragraphs in the newspapers as to the movements or intentions of this or that prominent man, the reports of what is doing in Congress and in the State legislatures, the decisions of the Federal courts in constitutional questions, the rumours about new combinations, the revelations of Ring intrigues, the criticisms on appointments. It is nevertheless true that in proportion to the number of words spoken, articles printed, telegrams sent, and acts performed, less than is needed is done to form serious political thought, and bring practical problems towards a solution. The machine of government carries these problems slowly onward. But fortunately the people have usually no need to hurry. It is not so much by or through the machinery of government as by their own practical good sense, which at last finds a solution the politicians may have failed to find, that the American people advance. In the company of the best citizens of one of the great cities, every visitor is struck by the acuteness, the insight, the fairness with which the condition and requirements of the country are discussed, the freedom from such passion or class feeling as usually clouds equally able Europeans, the substantial agreement between members of both the great parties as to the reforms that are wanted, the patriotism which is so proud of the real greatness of the Union as frankly to acknowledge its defects, the generous appreciation of all that is best in the character or political methods of

other nations. One feels what a reserve fund of wisdom and strength the country has in such men, who so far from being aristocrats or recluses, are usually the persons whom their native fellow-townsmen best know and most respect as prominent in business and in the professions.

In ordinary times the practical concern of such men with either National or local politics is not very close. But when there comes an uprising against the bosses, it is these men who are called upon to put themselves at the head of it; or when a question like that of civil service reform has been before the nation for some time, it is their opinion which strikes the keynote for that of their city or district, and which shames or alarms the professional politicians. Men of the same type, though individually less conspicuous than those whom I take as examples, are to be found in many of the smaller towns, especially in the Eastern and Middle States, and as time goes on their influence grows. Much of the value of this most educated and reflective class in America consists in their being no longer blindly attached to their party, because more alive to the principles for which parties ought to exist. They may be numerically a small minority of the voters, but as in many States the two regular parties command a nearly equal normal voting strength, a small section detached from either party can turn an election by throwing its vote for the candidate, to whichever party he belongs, whom it thinks capable and honest. Thus an independent group wields a power altogether disproportionate to its numbers, and by a sort of side wind can not only make its hostility feared, but secure a wider currency for its opinions. What opinion chiefly needs in America in order to control the politicians is not so much men of leisure, for men of leisure may be dilettantes and may lack a grip of realities, but a more sustained activity on the part of the men of vigorously independent minds, a more sedulous effort on their part to impress their views upon the masses, and a disposition on the part of the ordinary well-meaning but often inattentive citizens to prefer the realities of good administration to outworn party cries.

CHAPTER LVII

FAILURES AND SUCCESSES OF PUBLIC OPINION

The obvious weakness of government by opinion is the difficulty of ascertaining it. Such is the din of voices that it is hard to say which cry prevails, which is swelled by many, which only by a few throats. The organs of opinion seem almost as numerous as the people themselves, and they are all engaged in representing their own view as that of "the people." Like other valuable articles, genuine opinion is surrounded by counterfeits. The one positive test applicable is that of an election, and an election can at best do no more than test the division of opinion between two or three great parties, leaving subsidiary issues uncertain, while in many cases the result depends so much on the personal merits of the candidates as to render interpretation difficult. An American statesman is in no danger of consciously running counter to public opinion, but how is he to discover whether any particular opinion is making or losing way, how is he to gauge the voting strength its advocates can put forth, or the moral authority its advocates can exert? Elections cannot be further multiplied, for they are too numerous already. The *referendum*, or plan of submitting a specific question to the popular vote, is the logical resource, but it is troublesome and costly to take the votes of millions of people over an area so large as that of one of the greater States; much more then is the method difficult to apply in Federal matters. This is the first drawback to the rule of public opinion. The choice of persons for offices is only an indirect and often unsatisfactory way of declaring views of policy, and as the elections at which such choices are made come at fixed intervals, time is lost in waiting for the opportunity of delivering the popular judgment.

As the progress of democracy has increased the self-distrust and submission to the popular voice of legislators, so the

defects incident to a system of restrictions and balances have been aggravated. Thus the difficulty inherent in government by public opinion makes itself seriously felt. It can express desires, but has not the machinery for turning them into practical schemes. It can determine ends, but is less fit to examine and select means. Yet it has weakened the organs by which the business of finding appropriate means ought to be discharged.

Public opinion is slow and clumsy in grappling with large practical problems. It looks at them, talks incessantly about them, complains of Congress for not solving them, is distressed that they do not solve themselves. But they remain unsolved. Vital decisions have usually hung fire longer than they would have been likely to do in European countries. The war of 1812 seemed on the point of breaking out over and over again before it came at last. The absorption of Texas was a question of many years. The Extension of Slavery question came before the nation in 1819; after 1840 it was the chief source of trouble; year by year it grew more menacing; year by year the nation was seen more clearly to be drifting towards the breakers. Everybody felt that something must be done. But it was the function of no one authority in particular to discover a remedy, as it would have been the function of a cabinet in Europe. I do not say the sword might not in any case have been invoked, for the temperature of Southern feeling had been steadily rising to war point. But the history of 1840–60 leaves an impression of the dangers which may result from fettering the constitutional organs of government, and trusting to public sentiment to bring things right.

And the same thing holds, *mutatis mutandis*, of State governments. In them also there is no set of persons whose special duty it is to find remedies for admitted evils. The structure of the government provides the requisite machinery neither for forming nor for guiding a popular opinion, disposed of itself to recognize only broad and patent facts, and to be swayed only by such obvious reasons as it needs little reflection to follow. Admirable practical acuteness, admirable ingenuity in inventing and handling machinery, whether of iron and wood or of human beings, coexist, in the United States, with an aversion to the investigation of general principles as

well as trains of systematic reasoning. The liability to be caught by fallacies, the inability to recognize facts which are not seen but must be inferentially found to exist, the incapacity to imagine a future which must result from the unchecked operation of present forces, these are indeed the defects of the ordinary citizen in all countries, and if they are conspicuous in America, it is only because the ordinary citizen, who is more intelligent there than elsewhere, is also more potent.

We must, however, remember how much is gained as well as lost by the slow and hesitating working of public opinion in the United States. So tremendous a force would be dangerous if it moved rashly. Acting over and gathered from an enormous area, in which there exist many local differences, it needs time, often a long time, to become conscious of the preponderance of one set of tendencies over another. The elements both of local difference and of class difference must be (so to speak) well shaken up together, and each part brought into contact with the rest, before the mixed liquid can produce a precipitate in the form of a practical conclusion. And in this is seen the difference between the excellence as a governing power of opinion in the whole Union, and opinion within the limits of a particular State. The systems of constitutional machinery by which public sentiment acts are similar in the greater and in the smaller area; the constitutional maxims practically identical. But public opinion, which moves slowly, and, as a rule, temperately, in the field of National affairs, is sometimes hasty and reckless in State affairs.

We may go on to ask how far American opinion succeeds in the simpler duty, which opinion must discharge in all countries, of supervising the conduct of business, and judging the current legislative work which Congress and other legislatures turn out.

Here again the question turns not so much on the excellence of public opinion as on the adequacy of the constitutional machinery provided for its action. That supervision and criticism may be effective, it must be easy to fix on particular persons the praise for work well done, the blame for work neglected or ill-performed. Experience shows that good men are the better for a sense of their responsibility and ordinary men

useless without it. The American plan of dividing powers, eminent as are its other advantages, makes it hard to fix responsibility. The executive can usually allege that it had not received from the legislature the authority necessary to enable it to grapple with a difficulty; while in the legislature there is no one person or group of persons on whom the blame due for that omission or refusal can be laid. Suppose some gross dereliction of duty to have occurred. The people are indignant. A victim is wanted, who, for the sake of the example to others, ought to be found and punished, either by law or by general censure. But perhaps he cannot be found, because out of several persons or bodies who have been concerned, it is hard to apportion the guilt and award the penalty. Where the sin lies at the door of Congress, it is not always possible to arraign either the speaker or the dominant majority, or any particular party leader. Where a State legislature or a city council has misconducted itself, the difficulty is still greater, because party ties are less strict in such a body, proceedings are less fully reported, and both parties are apt to be equally implicated in the abuses of private legislation. Not uncommonly there is presented the sight of an exasperated public going about like a roaring lion, seeking whom it may devour, and finding no one. The results in State affairs would be much worse were it not for the existence of the governor with his function of vetoing bills, because in many cases, knowing that he can be made answerable for the passage of a bad measure, he is forced up to the level of a virtue beyond that of the natural man in politics. And the disposition to seek a remedy for municipal misgovernment in increasing the powers of the mayor illustrates the same principle.

Although the failures of public opinion in overseeing the conduct of its servants are primarily due to the want of appropriate machinery, they are increased by its characteristic temper. Quick and strenuous in great matters, it is heedless in small matters, over-kindly and indulgent in all matters. It suffers weeds to go on growing till they have struck deep root. It has so much to do in looking after both Congress and its State legislature, a host of executive officials, and perhaps a city council also, that it may impartially tolerate the misdoings of all till some important issue arises. To catch and to hold

the attention of the people is the chief difficulty as well as the first duty of an American reformer.

The long-suffering tolerance of public opinion towards incompetence and misconduct in officials and public men generally, is a feature which has struck recent European observers. It is the more remarkable because nowhere is executive ability more valued in the management of private concerns, in which the stress of competition forces every manager to secure at whatever price the most able subordinates. We may attribute it partly to the good nature of the people, which makes them over-lenient to nearly all criminals, partly to the preoccupation with their private affairs of the most energetic and useful men, who therefore cannot spare time to unearth abuses and get rid of offenders, partly to an indifference induced by a sort of fatalistic sentiment. This sentiment acts in two ways. Being optimistic, it disposes each man to believe that things will come out right whether he "takes hold" himself or not, and that it is therefore no great matter whether a particular Ring or Boss is suppressed. And in making each individual man feel his insignificance, it disposes him to leave to the multitude the task of setting right what is every one else's business just as much as his own. An American does not smart under the same sense of personal wrong from the mismanagement of his public business, from the exaction of high city taxes and their malversation, as an Englishman would in the like case. If he suffers, he consoles himself by thinking that he suffers with others, as part of the general order of things, which he is no more called upon to correct than are his neighbours.

It may be charged as a weak point in the rule of public opinion, that by fostering this habit it has chilled activity and dulled the sense of responsibility among the leaders in political life. It has made them less eager and strenuous in striking out ideas and plans of their own, less bold in propounding those plans, more sensitive to the reproach of being a crotchet-monger or a doctrinaire. That new or unpopular ideas are more frequently started by isolated thinkers, economists, social reformers, than by statesmen, may be set down to the fact that practical statesmanship indisposes men to theorizing. But the practical statesman is apt to be timid in advocacy as

well as infertile in suggestion. He seems to be always listening for the popular voice, always afraid to commit himself to a view which may turn out unpopular. It is a fair conjecture that this may be due to his being by his profession a far more habitual worshipper as well as observer of public opinion, than will be the case with men who are by profession thinkers and students. Philosophy, taking the word to include the historical study of the forces which work upon mankind at large, is needed by a statesman not only as a consolation for the disappointments of his career, but as a corrective to the superstitions and tremors which the service of the multitude implants.

The enormous force of public opinion is a danger to the people themselves, as well as their leaders. It no longer makes them tyrannical. But it fills them with an undue confidence in their wisdom, their virtue, and their freedom. It may be thought that a nation which uses freedom well can hardly have too much freedom; yet even such a nation may be too much inclined to think freedom an absolute and all-sufficient good, to seek truth only in the voice of the majority, to mistake prosperity for greatness. Such a nation, seeing nothing but its own triumphs, and hearing nothing but its own praises, seems to need a succession of men like the prophets of Israel to rouse the people out of their self-complacency, to refresh their moral ideals, to remind them that the life is more than meat, and the body more than raiment, and that to whom much is given of them shall much also be required. If America has no prophets of this order, she fortunately possesses two classes of men who maintain a wholesome irritation. These are the instructed critics who exert a growing influence on opinion through the higher newspapers, and by literature generally, and the philanthropic reformers who tell more directly upon the multitude, particularly through the churches. Both classes combined may not as yet be doing all that is needed. But the significant point is that their influence represents not an ebbing but a flowing tide. If the evils they combat exist on a larger scale than in past times, they, too, are more active and more courageous in rousing and reprehending their fellow-countrymen.

The strong point of the American system, the dominant fact of the situation, is the healthiness of public opinion, and the con-

trol which it exerts. As Abraham Lincoln said in his famous contest with Douglas, "With public sentiment on its side everything succeeds; with public sentiment against it, nothing succeeds."

The conscience and common sense of the nation as a whole keep down the evils which have crept into the working of the Constitution, and may in time extinguish them. Public opinion is a sort of atmosphere, fresh, keen, and full of sunlight, like that of the American cities, and this sunlight kills many of those noxious germs which are hatched where politicians congregate. That which, varying a once famous phrase, we may call the genius of universal publicity, has some disagreeable results, but the wholesome ones are greater and more numerous. Selfishness, injustice, cruelty, tricks, and jobs of all sorts shun the light; to expose them is to defeat them. No serious evils, no rankling sore in the body politic, can remain long concealed, and when disclosed, it is half destroyed. So long as the opinion of a nation is sound, the main lines of its policy cannot go far wrong, whatever waste of time and money may be incurred in carrying them out.

The frame of the American government has assumed and trusted to the activity of public opinion, not only as the power which must correct and remove the difficulties due to the restrictions imposed on each department, and to possible collisions between them, but as the influence which must supply the defects incidental to a system which works entirely by the machinery of popular elections. Under a system of elections one man's vote is as good as another, the vicious and ignorant have as much weight as the wise and good. A system of elections might be imagined which would provide no security for due deliberation or full discussion, a system which, while democratic in name, recognizing no privilege, and referring everything to the vote of the majority, would in practice be hasty, violent, tyrannical. It is with such a possible democracy that one has to contrast the rule of public opinion as it exists in the United States. Opinion declares itself legally through elections. But opinion is at work at other times also, and has other methods of declaring itself. It secures full discussion of issues of policy and of the characters of men. It suffers nothing to be concealed. It listens patiently to all the arguments

that are addressed to it. Eloquence, education, wisdom, the authority derived from experience and high character, tell upon it in the long run, and have, perhaps not always their due influence, but yet a great and growing influence. Thus a democracy governing itself through a constantly active public opinion, and not solely by its intermittent mechanism of elections, tends to become patient, tolerant, reasonable, and is more likely to be unembittered and unvexed by class divisions.

It is the existence of such a public opinion as this, the practice of freely and constantly reading, talking, and judging of public affairs with a view to voting thereon, rather than the mere possession of political rights, that gives to popular government that educated and stimulative power which is so frequently claimed as its highest merit. Those who, in the last generation, were forced to argue for democratic government against oligarchies or despots, were perhaps inclined, if not to exaggerate the value of extended suffrage and a powerful legislature, at least to pass too lightly over the concomitant conditions by whose help such institutions train men to use liberty well. History does not support the doctrine that the mere enjoyment of power fits large masses of men, any more than individuals or classes, for its exercise. Along with that enjoyment there must be found some one or more of various auspicious conditions, such as a direct and fairly equal interest in the common welfare, the presence of a class or group of persons respected and competent to guide, an absence of religious or race hatreds, a high level of education or at least of intelligence, old habits of local self-government, the practice of unlimited free discussion.

In America it is not simply the habit of voting, but the briskness and breeziness of the whole atmosphere of public life, and the process of obtaining information and discussing it, of hearing and judging each side, that form the citizen's intelligence. True it is that he would gain less from this process if it did not lead up to the exercise of voting power: he would not learn so much on the road did not the polling-booth stand at the end of it. But if it were his lot, as it is that of the masses in some European countries, to exercise his right of suffrage under few of these favouring conditions, the educational value of the vote would become

comparatively small. It is the habit of breathing as well as helping to form public opinion that cultivates, develops, trains the average American. It gives him a sense of personal responsibility stronger, because more constant, than exists in those free countries of Europe where he commits his power to a legislature. Sensible that his eye ought to be always fixed on the conduct of affairs, he grows accustomed to read and judge, not indeed profoundly, sometimes erroneously, usually under party influences, but yet with a feeling that the judgment is his own. He has a sense of ownership in the government, and therewith a kind of independence of manner as well as of mind very different from the demissness of the humbler classes of the Old World. And the consciousness of responsibility which goes along with this laudable pride, brings forth the peaceable fruits of moderation. As the Greeks thought that the old families ruled their households more gently than upstarts did, so citizens who have been born to power, born into an atmosphere of legal right and constitutional authority, are sobered by their privileges. Despite their natural quickness and eagerness, the native Americans are politically patient. They are disposed to try soft means first, to expect others to bow to that force of opinion which they themselves recognize. Opposition does not incense them; danger does not, by making them lose their heads, hurry them into precipitate courses. In no country does a beaten minority take a defeat so well. Admitting that the blood of the race counts for something in producing that peculiar coolness and self-control in the midst of an external effervescence of enthusiasm, which is the most distinctive feature of the American masses, the habit of ruling by public opinion and obeying it counts for even more. It was far otherwise in the South before the war, but the South was not a democracy, and its public opinion was that of a passionate class.

The best evidence for this view is to be found in the educative influence of opinion on new-comers. Any one can see how severe a strain is put on democratic institutions by the influx every year of half a million of untrained Europeans, not to speak of those French Canadians who now settle in the North-eastern States. Being in most States admitted to full civic rights before they have come to shake off European notions

and habits, these strangers enjoy political power before they either share or are amenable to American opinion. Such immigrants are at first not merely a dead weight in the ship, but a weight which party managers can, in city politics, so shift as to go near upsetting her. They follow blindly leaders of their own race, are not moved by discussion, exercise no judgment of their own. This lasts for some years, probably for the rest of life with those who are middle-aged when they arrive. It lasts also with those who remain herded together in large masses, and makes them a dangerous element in manufacturing and mining districts. But the younger sort, when, if they be foreigners, they have learnt English, and when, dispersed among Americans so as to be able to learn from them, they have imbibed the sentiments and ideas of the country, are thenceforth scarcely to be distinguished from the native population. They are more American than the Americans in their desire to put on the character of their new country. This peculiar gift which the Republic possesses, of quickly dissolving and assimilating the foreign bodies that are poured into her, imparting to them her own qualities of orderliness, good sense, self-restraint, a willingness to bow to the will of the majority, is mainly due to the all-pervading force of opinion, which the new-comer, so soon as he has formed social and business relations with the natives, breathes in daily till it insensibly transmutes him.

If public opinion is heedless in small things, it usually checks measures which, even if not oppressive, are palpably selfish or unwise. If before a mischievous bill passes, its opponents can get the attention of the people fixed upon it, its chances are slight. All sorts of corrupt or pernicious schemes which are hatched at Washington or in the State legislatures are abandoned because it is felt that the people will not stand them, although they could be easily pushed through those not too scrupulous assemblies. There have been instances of proposals which took people at first by the plausibility, but which the criticism of opinion riddled with its unceasing fire till at last they were quietly dropped.

Public opinion often fails to secure the appointment of the best men to places, but where undivided responsibility can be fixed on the appointing authority, it prevents, as those who are

behind the scenes know, countless bad appointments for which politicians intrigue.

In questions of foreign policy, opinion is a valuable reserve force. When demonstrations are made by party leaders intended to capture the vote of some particular section, the native Americans only smile. But they watch keenly the language held and the acts done by the State Department (Foreign Office), and, while determined to support the President in vindicating the rights of American citizens, would be found ready to check any demand or act going beyond their legal rights which could tend to embroil them with a foreign power. Justice and equity are more generally recognized as binding upon nations no less than on individuals. Whenever humanity comes into question, the heart of the people is sound. The treatment of the Indians reflects little credit on the Western settlers who have come in contact with them, and almost as little on the Federal government, whose efforts to protect them have been often foiled by the faults of its own agents, or by its own want of promptitude and foresight. But the wish of the people at large has always been to deal generously with the aborigines, nor have appeals on their behalf ever failed to command the sympathy and assent of the country.

It has been observed that the all-subduing power of the popular voice may tell against the appearance of great statesmen by dwarfing aspiring individualities, by teaching men to discover and obey the tendencies of their age rather than rise above them and direct them. If this happens in America, it is not because the American people fail to appreciate and follow and exalt such eminent men as fortune bestows upon it. It has a great capacity for loyalty, even for hero-worship. "Our people," said an experienced American publicist to me, "are in reality hungering for great men, and the warmth with which even pinchbeck geniuses, men who have anything showy or taking about them, anything that is deemed to betoken a strong individuality, are followed and glorified in spite of intellectual emptiness, and perhaps even moral shortcomings, is the best proof of the fact." Henry Clay was the darling of his party for many years, as Jefferson, with less of personal fascination, had been in the preceding generation. Daniel Webster retained the devotion of New England long after it

had become clear that his splendid intellect was mated to a far from noble character. A kind of dictatorship was yielded to Abraham Lincoln, whose memory is cherished almost like that of Washington himself. I doubt if there be any country where a really brilliant man, confident in his own strength, and adding the charm of a striking personality to the gift of popular eloquence, would find an easier path to fame and power, and would exert more influence over the minds and emotions of the multitude. Such a man, speaking to the people with the independence of conscious strength, would find himself appreciated and respected.

Even as respects the methods of political controversy an improvement is discernible. Partisans are reckless, but the mass of the people lends itself less to acrid partisanship that it did in the time of Jackson, or in those first days of the Republic which were so long looked back to as a sort of heroic age. Public opinion grows more temperate, more mellow, and assuredly more tolerant. Its very strength disposes it to bear with opposition or remonstrance. It respects itself too much to wish to silence any voice.

CHAPTER LVIII

THE HOME OF THE NATION

There are three points wherein the territories which constitute the United States present phenomena new in the annals of the world. They contain a huge people whose blood is becoming mixed in an unprecedented degree by the concurrent immigration of numerous European races. We find in them, besides the predominant white nation, seven millions of men belonging to a dark race, thousands of years behind in its intellectual development, but legally equal in political and civil rights. And thirdly, they furnish an instance to which no parallel can be found of a vast area, including regions very dissimilar in their natural features, occupied by a population nearly the whole of which speaks the same tongue, and all of which lives under the same institutions. Of these phenomena the third suggests to us thoughts and questions which cannot pass unnoticed. No one can travel in the United States without asking himself whether this immense territory will remain united or be split up into a number of independent communities; whether, even if it remain united, diverse types of life and character will spring up within it; whether and how far climatic and industrial conditions will affect those types, carrying them farther from the prototypes of Europe. These questions, as well as other questions regarding the future local distribution of wealth and population, open fields of inquiry and speculation too wide to be here explored. Yet some pages may well be given to a rapid survey of the geographical conditions of the United States, and of the influence those conditions have exerted and may, so far as can be foreseen, continue to exert on the growth of the nation, its political and economical development. Beginning with a few observations first on the orography of the country and then upon its meteorology, we may consider how mountain ranges and climate have hitherto affected the movement of colonization and the main

stream of political history. The chief natural sources of wealth may next be mentioned, and their possible effect indicated upon the development of population in particular areas, as well as upon the preservation of the permanent unity of the Republic.

One preliminary remark must not be omitted. The relation of geographical conditions to National growth changes, and with the upward progress of humanity the ways in which Nature moulds the fortunes of man are always varying. Man must in every stage be for many purposes dependent upon the circumstances of his physical environment. Yet the character of that dependence changes with his advance in civilization. At first he is helpless, and, therefore, passive. With what Nature gives in the way of food, clothing, and lodging he must be content. She is strong, he is weak: so she dictates his whole mode of life. Presently, always by slow degrees, but most quickly in those countries where she neither gives lavishly nor yet presses on him with a discouraging severity, he begins to learn how to make her obey him, drawing from her stores materials which his skill handles in such wise as to make him more and more independent of her. He defies the rigours of climate; he overcomes the obstacles which mountains, rivers, and forests place in the way of communications; he discovers the secrets of the physical forces and makes them his servants in the work of production. But the very multiplication of the means at his disposal for profiting by what Nature supplies brings him into ever closer and more complex relations with her. The variety of her resources, differing in different regions, prescribes the kind of industry for which each spot is fitted; and the competition of nations, growing always keener, forces each to maintain itself in the struggle by using to the utmost every facility for production or for the transportation of products. Thus certain physical conditions, whether of soil or of climate, of accessibility or inaccessibility, or perhaps of such available natural forces as water-power, conditions of supreme importance in the earlier stages of man's progress, are now of less relative moment, while others, formerly of small account, have received their full significance by our swiftly advancing knowledge of the secrets of nature and mastery of her forces. It is this which makes the examination of the

influence of physical environment on the progress of nations so intricate a matter; for while the environment remains, as a whole, constant, its several parts vary in their importance from one age to another. A certain severity of climate, for instance, which retarded the progress of savage man, has been found helpful to semi-civilized man, in stimulating him to exertion, and in maintaining a racial vigour greater than that of the inhabitants of those hotter regions where civilization first arose. And thus in considering how man's lot and fate in the Western Continent have been affected by the circumstances of that continent, we must have regard not only to what he found on his arrival there, but to the resources which have been subsequently disclosed. Nor can this latter head be exhausted, because it is impossible to conjecture what still latent forces or capacities may be revealed in the onward march of science, and how such a revelation may affect the value of the resources now known to exist or hereafter to be explored.

It is only on a very few salient points of this large and complex subject that I shall touch in sketching the outlines of North American geography and noting some of the effects on the growth of the nation attributable to them.

The territory of the United States extends nearly 3000 miles east and west from the Bay of Fundy to the mouth of the Columbia River, and 1400 miles north and south from the Lake of the Woods to the Gulf of Mexico at Galveston. Compared with Europe, the physical structure of this area of 3,025,000 square miles (excluding Alaska) is not only larger in scale, but far simpler. Instead of the numerous peninsulas and islands of Europe, with the bold and lofty chains dividing its peoples from one another, we find no isles (except Long Island) of any size on the two coasts of the United States, only one large peninsula (that of Florida), and only two mountain systems. Not only the lakes and rivers, but the plains also, and the mountain ranges, are of enormous dimensions. The coast presents a smooth outline. No great inlets, such as the Mediterranean and the Baltic, pierce the land and cut off one district from another, furnishing natural boundaries behind which distinct nations may grow up.

This vast area may be divided into four regions — two of level country, two, speaking roughly, of mountain. Begin-

ning from the Atlantic, we find a strip which on the coast is nearly level, and then rises gradually westwards into an undulating country. It varies in breadth from thirty or forty miles in the north to two hundred and fifty in the south, and has been called by geographers the Atlantic Plain and Slope. Behind this strip comes a range, or rather a mass of generally parallel ranges, of mountains. These are the Alleghanies, or so-called "Appalachian system," in breadth from one hundred to two hundred miles, and with an average elevation of from two to four thousand feet, some few summits reaching six thousand. Beyond them, still further to the west, lies the vast basin of the Mississippi and its tributaries, 1100 miles wide and 1200 miles long. Its central part is an almost unbroken plain for hundreds of miles on each side the river, but this plain rises slowly westward in rolling undulations into a sort of plateau, which, at the foot of the Rocky Mountains, has attained the height of 5000 feet above the sea. The fourth region consists of the thousand miles that lie between the Mississippi basin and the Pacific. It includes three not entirely disconnected mountain ranges, the Rockies, the Sierra Nevada (continued northwards in the Cascade Range), and the much lower and narrower Coast Range, which runs along the shore of the ocean. This region is generally mountainous, though within it there are some extensive plateaux and some wide valleys. Most of it is from 4000 to 8000 feet above the sea, with many summits exceeding 14,000, though none reaches 15,000. A considerable part of it, including the desert of Nevada, does not drain into the ocean, but sees its feeble streams received by lakes or swallowed up in the ground.

Before we consider how these natural divisions have influenced, and must continue to influence, American history, it is well to observe how materially they have affected the climate of the continent, which is itself a factor of prime historical importance. Two points deserve special notice. One is the great extent of temperate area which the continent presents. As North America is crossed by no mountain chains running east and west, corresponding to the Alps and Pyrenees in Europe, or to the Caucasus, Himalaya, and Altai in Asia, the cold winds of the north sweep down unchecked over the vast Mississippi plain, and give its central and southern parts,

down to the Gulf of Mexico, winters cooler than the latitude seems to promise, or than one finds in the same latitudes in Europe. Nor ought the influence of the neighbouring seas to pass unregarded. Europe has, south of the narrow Mediterranean, a vast reservoir of heat in the Sahara: North America has the wide stretch of the Gulf of Mexico and the Caribbean Sea, with no region both hot and arid beyond. Thus Tennessee and Arkansas, in the latitude of Andalusia and Damascus, have a winter like that of Edinburgh twenty degrees further to the north; and while the summer of Minnesota, in latitude 45°, is as hot as that of Bordeaux or Venice in the same latitude, the winter is far more severe. Only the lowlands along the Atlantic coast as far north as Cape Hatteras have a high winter as well as summer temperature, for they are warmed by the hot water of the Gulf Stream, just as the extreme north-eastern coast is chilled by the Polar current which washes it. The hilly country behind these southern Atlantic lowlands — the western parts of the two Carolinas, Northern Georgia and Alabama — belongs to the Appalachian system, and is high enough to have cool and in parts even severe winters.

The other point relates to the amount of moisture. The first two of our four regions enjoy an ample rainfall. So do the eastern and the central parts of the Mississippi basin. When, however, we reach the centre of the continent, some four hundred miles west of the Mississippi, the air grows dry, and the scanty showers are not sufficient for the needs of agriculture. It is only by the help of irrigation that crops can be raised all along the east foot of the Rocky Mountains and in the valleys of the fourth region, until we cross the Sierra Nevada and come within two hundred miles of the Pacific. Through great part of this Rocky Mountain region, therefore, stock rearing, or "ranching," as it is called, takes the place of tillage, and in many districts there is not enough moisture even to support grass. Between the Rocky Mountains and the Sierra Nevada there lie vast deserts, the largest that which stretches westward from the Great Salt Lake,[1] a

[1] Similar but smaller deserts occur in Idaho and south-eastern Oregon, and also in the extreme south-west. Part of the desert of Southern California is, like part of the Sahara and the valley of the Jordan and the Dead Sea, beneath the level of the ocean.

desert of clay and stones rather than of sand, bearing only alkaline plants with low, prickly shrubs, and, apparently, destined to remain, save in some few spots where brooks descend from the mountains,[1] eternally sterile and solitary. Lofty as these environing mountains are, they bear scarce any perpetual snow, and no glaciers at all south of the fortieth parallel of north latitude.[2] The great peaks of Colorado lie little further south than the Pennine Alps, which they almost equal in height, but it is only in nooks and hollows turned away from the sun that snow lasts through the summer, so scanty is the winter snow-fall and so rapidly does evaporation proceed in the dry air.

That same general north and south direction of the American mountain ranges, which gives cool winters to the Southern States, cuts off the east-borne rain-clouds from the Pacific, and condemns one-half or more of our fourth region to aridity. On the other hand, north-western California, with the western parts of Oregon and Washington, washed by the Japan current, enjoy both a moderate and a humid — in some places very humid — climate, which, along the Pacific coast north of latitude 43°, resembles that of south-western England.

Reserving for the moment a consideration of the wealth-producing capacities of the regions at whose physical structure and climate we have glanced, let us note how that structure and climate have affected the fortunes of the people.

Whoever examines the general lines of a nation's growth, will observe that its development has been guided and governed by three main factors. The first is the pre-existing character and habits of the race out of which the nation grows. The second is the physical aspect of the land the nation is placed in, and the third embraces the international concomitants of its formation, — that is to say, the pressure of other nations upon it, and the external political circumstances which have controlled its movement, checking it in one direction or making it spread in another. The first of these factors may, in the case of the American people, be assumed as known,

[1] In Central Colorado, when snow falls, it does not melt but disappears by evaporation, so dry is the air. Sir J. D. Hooker has (in his *Himalayan Journals*) noted the same phenomenon in Tibet.

[2] There is a small glacier on Mount Shasta.

for their character and habits were substantially English. To the second I will return presently.

The third factor has been in the United States so unusually simple that one may dismiss it in a few sentences. In examining the origin of such nations as the German or French or Russian or Swiss or Spanish, one must constantly have regard to the hostile or friendly races or powers which acted on them; and these matters are, for the earlier periods of European history, often obscure. About America we know everything, and what we know may be concisely stated. The territory now covered by the United States was, from a political point of view, practically vacant when discovered in the end of the sixteenth century; for the aborigines, though their resistance was obstinate in places, and though that resistance did much to form the character of the Western pioneers, may be left out of account as a historical force. This territory was settled from three sides, east, south, and west, and by three European peoples. The Spaniards and French occupied points on the coast of the Gulf. The Spaniards took the shores of the Pacific. The English (reckoning among the English the cognate Dutchmen and Swedes) planted a series of communities along the Atlantic coast. Of these three independent colonizations, that on the Gulf was feeble, and passed by purchase to the Anglo-Americans in 1803 and 1819. That on the Pacific was still more feeble, and also passed, but by conquest, to the Anglo-Americans in 1848. Thus the occupation of the country has been from its eastern side alone (save that California received her immigrants by sea between 1847 and 1867), and the march of the people has been steadily westward and south-westward. They have spread where they would. Other powers have scarcely affected them. Canada, indeed, bounds them on the north, but they have found no need to overflow into her narrow strip of habitable territory, whence, indeed, a million of people have come into their wealthier dominions. Like the Spaniards in South America, like the British in Australia, like the Russians in Siberia, the Anglo-Americans have had a free field; and we may pass from the purely political or international factor in the development of the nation to consider how its history has been affected by those physical conditions which have been previously noted.

The English in America were, when they began their march, one people, though divided into a number of autonomous communities; and, to a people already advanced in civilization, the country was one country, as if destined by nature to retain one and undivided whatever nation might occupy it.

The first settlements were in the region described above as the Atlantic Plain and Slope. No natural boundary, whether of water or mountain or forest, divided the various communities. The frontier line which bounded each colony was an artificial line,—a mere historical accident. So long as they remained near the coast, nature opposed no obstacle to their co-operation in war, nor to their free social and commercial intercourse in peace. When, however, they had advanced westwards as far as the Alleghanies, these mountains barred their progress, not so much in the North, where the valley of the Hudson and Mohawk gave an easy path inland, as in Pennsylvania, Virginia, and Carolina. The dense, tangled, and often thorny underwood, even more than the high steep ridges, checked the westward movement of population, prevented the settlers from spreading out widely, as the Spaniards dispersed themselves over Central and South America, and helped, by inducing a comparatively dense population, to build up compact commonwealths on the Atlantic coast. So, too, the existence of this rough and, for a long time, almost impassable mountain belt, tended to cut off those who had crossed it into the Western wilderness from their more polished parent stock, to throw them on their own resources in the struggle with the fierce aborigines of Kentucky and Ohio, and to give them that distinctive character of frontiersmen which was so marked a feature of American history during the first half of this century, and has left deep traces on the Western men of to-day.

When population began to fill the Mississippi Basin the essential physical unity of the country became more significant. It suggested to Jefferson, and it led Congress to approve, the purchase of Louisiana from Napoleon, for those who had begun to occupy the valleys of the Ohio and Tennessee rivers felt that they could not afford to be cut off from the sea to which these highways of commerce led. Once the stream of migration across and around the southern extremity of the

Alleghanies had begun to flow steadily, the settlers spread out in all directions over the vast plain, like water over a marble floor. The men of the Carolinas and Georgia filled Alabama, Mississippi, and Arkansas; the men of Virginia and Kentucky filled southern Indiana, southern Illinois, and Missouri; the men of New England, New York, and Ohio filled Michigan, northern Illinois, Wisconsin, Iowa, and Minnesota. From the source to the mouth of the Mississippi there was nothing to break them up or keep them apart. Every Western State, except where it takes a river as a convenient boundary, is bounded by straight lines, because every State is an artificial creation. The people were one, and the wide featureless plain was also one. It has been cut into those huge plots we call States, not because there were physical or racial differences requiring divisions, but merely because political reasons made a Federal seem preferable to a unitary system. As the size of the plain showed that the nation would be large, so did the character of the plain promise that it would remain united. When presently steamers came to ply upon the rivers, each part of the plain was linked more closely to the others; and when the network of railways spread itself out from the east to the Mississippi, the Alleghanies practically disappeared. They were no longer a barrier to communication. Towns sprang up in their valleys; and now the three regions, which have been described as naturally distinct, the Atlantic Slope, the Alleghanies, and the Mississippi Basin, have become, economically and socially as well as politically, one country, though the dwellers in the wilder parts of the broad mountain belt still lag far behind their neighbours of the eastern and western lowlands.

When, however, the swelling tide of emigration reached the arid lands at the eastern base of the Rocky Mountains, its course was for a time stayed. This fourth region of mountain and desert, lying between the prairies of the Mississippi affluents and the Pacific Ocean, was, except its coast line, an unknown land till its cession by Mexico in 1846, and the inner and higher parts of it remained unexplored for some twenty years longer. As it was mostly dry and rugged, there was little to tempt settlers into it, for vast tracts of good land remained untouched in the central Mississippi plain. Many

years might have passed before it began to fill up, but for the unexpected finding of gold in California. This event at once drew in thousands of settlers; and fresh swarms followed as other mines, principally of silver, began to be discovered in the inland mountain ranges; till at last for the difficult and dangerous wagon track there was substituted a railway, completed in 1867, over mountains and through deserts from the Missouri to the Pacific.

Had the Americans of 1850 possessed no more scientific resources than their grandfathers in 1790, the valleys of the Pacific coast, accessible only by sea round Cape Horn, or across the Isthmus of Panama, would have remained isolated from the rest of the country, with a tendency to form a character and habits of their own, and possibly disposed to aim at political independence. This, however, the telegraph and the railways have prevented. Yet the Rocky Mountains have not, like the Alleghanies, disappeared. The better peopled parts of California, Oregon, and Washington still find that range and the deserts a far more effective barrier than are the lower and narrower ridges on the eastern side of the continent. The fourth region remains a distinct section of the United States, both geographically and to some extent in its social and industrial aspects. All this was to be expected. What need not have happened, and might even have been thought unlikely, was the easy acquisition by the Anglo-Americans of California, Oregon, and Washington, regions far removed from the dominions which the Republic already possessed. Had the competition for unappropriated temperate regions been half as keen in 1840 as it is now for tropical Africa (a far less attractive possession) between Germany, France, and Britain, some European power might have pounced upon these territories. They might then have become and remained a foreign country to the United States, and have had few and comparatively slight relations with the Mississippi Basin. It is not nature, but the historical accident which left them in the hands of a feeble power like Mexico, that has made them now, and, so far as can be foreseen, for a long future, members of the great federation.

In the south-east as well as in the west of the North American Continent, climate has been a prime factor in determining the

industrial and political history of the nation. South of the thirty-fifth parallel of latitude, although the winters are cool enough to be reinvigorative, and to enable a race drawn from Northern Europe to thrive and multiply,[1] the summers, except in the Alleghany highlands, are too hot for such a race to sustain hard open-air work, or to resist the malaria of the marshy coast lands. It was for this reason that soon after the settlement of Virginia, and for nearly two centuries afterwards, natives of the tropics were imported from Africa and set to till the fields. By their labour large crops of tobacco, cotton, rice, and sugar were raised, and large profits made; so that, while in the North-eastern States slavery presently died out, and the negroes themselves declined in numbers, all the wealth and prosperity of the South came to depend upon slave labour, and slavery became intertwined with the pecuniary interests as well as the social habits of the ruling class.

Thus a peculiar form of civilization grew up, so dissimilar from that of the northern half of the country, that not even the large measure of State independence secured under the Federal Constitution could enable the two sections to live together under the same government. Civil war followed, and for a time it seemed as if the nation were to be permanently rent in twain. Physical differences — differences of climate, and of all those industrial and social conditions that were due to climate — were at the bottom of the strife. Yet nature herself fought for imperilled unity. Had the seceding States been divided from the Northern States by any natural barrier, such as a mountain range running from east to west across the continent, the operations of the invading armies would have been incomparably more difficult. As it was, the path into the South lay open, and the great south-flowing rivers of the West helped the invader. Had there not existed, in the Alleghany Mountains, a broad belt of elevated land, thrusting into the revolted territory a wedge of white population which, as it did not own slaves (for in the mountains there were scarce any), did not sympathize with secession, and for the most part actively opposed it, the chances of the Southern Confederates would have been far greater. The Alleghanies interrupted the co-

[1] New Orleans is in the same latitude as Delhi, whence the children of Europeans have to be sent home in order that they may grow up in health.

operation of their eastern and western armies, and furnished recruits as well as adherents to the North; and it need hardly be added that the climatic conditions of the South made its white population so much smaller, and on the whole so much poorer, than that of the North, that exhaustion came far sooner. He who sees the South even to-day, when it has in many places gained vastly since the war, is surprised not that it succumbed, but that it was able so long to resist.

With the extinction of slavery, the political unity of the country was secured, and the purpose of nature to make it the domain of a single people might seem to have been fulfilled. Before we inquire whether this result will be a permanent one, so far as physical causes are concerned, another set of physical conditions deserves to be considered, those conditions, namely, of earth and sky, which determine the abundance of useful products, that is to say, of wealth, and therethrough, of population also.

The chief natural sources of wealth are fertile soils, mineral deposits, and standing timber.[1] Of these three the last is now practically confined to three districts,—the hills of Maine, the Alleghanies, and the maritime ranges of the Pacific coast, especially in Washington. Elsewhere, though there is a great deal of wooded country, the cutting and exporting of timber, or, as it is called beyond the Atlantic, "lumber," is not (except perhaps in Michigan) an important industry which employs or enriches many persons. It is, moreover, one which constantly declines, for the forests perish daily before fires and the axe far more swiftly than nature can renew them.

As no nation possesses so large an area of land available for the sustenance of man, so also none of the greatest nations can boast that out of its whole domain, so large a proportion of land is fit for tillage or for stock-rearing. If we except the stony parts of New England and eastern New York, where the soil is thinly spread over crystalline rocks, and the sandy districts which cover a considerable area in Virginia and North

[1] I omit the fisheries, because their commercial importance is confined to three districts, the coasts of Maine and Massachusetts, the rivers of Washington and parts of Alaska, with the seal-bearing Pribyloff Isles. The sea fisheries of the Pacific coast (Washington, Oregon, and California) are still imperfectly developed.

Carolina, nearly the whole of the more level tracts between the Atlantic and the Rocky Mountains is good agricultural land, while in some districts, especially on the upper Mississippi, this land has proved remarkably rich. Which soils will in the long run turn out most fertile, cannot yet be predicted. The prairie lands of the North-west have needed least labour and have given the largest returns to their first cultivators; but it is doubtful whether this superiority will be maintained when protracted tillage has made artificial aids necessary, as has already happened in not a few places. Some of the soils in the Eastern and Southern States are said to improve with cultivation, being rich in mineral constituents. Not less rich than the Mississippi prairies, but far smaller in area, are the arable tracts of the Pacific Slope, where, in Washington especially, the loam formed by the decomposition of the trappean rocks is eminently productive. In the inner parts of the Rocky Mountain region lie many plains and valleys of great natural fertility, but dependent, so deficient is the rainfall, upon an artificial supply of water. Were irrigation works constructed to bring water, or artesian wells successfully sunk, large areas might be cultivated; but land has not yet become scarce enough to make the execution of great works remunerative, and in many regions the sources of water supply are distant or uncertain. The Mormon settlements on the east and to the south of Great Salt Lake are the only considerable tract as yet thus reclaimed; there are, however, others from which an equally patient industry may draw like results.

In estimating mineral resources, it is well to distinguish between mines of gold, silver, copper, and lead on the one hand, and those of coal and iron on the other. The former are numerous, and have given vast wealth to a few lucky speculators. In some parts of the Rockies and the ranges linking them to the Sierra Nevada, the traveller saw, even twelve or fifteen years ago, silver mining claims staked out on every hill. But these mines are uncertain in their yield; and the value of silver is subject to great fluctuations. Coal and iron present a surer, if less glittering gain, and they are needed for the support of many important industries. Now, while gold, silver, and lead are chiefly found in the Rocky Mountain and Sierra Nevada system, copper mainly in the

West and on Lake Superior, the greatest coal and iron districts[1] are in Pennsylvania and Ohio, and along the line of the Alleghanies southwards into Alabama. It is chiefly in the neighbourhood of coal deposits that manufactures develop, yet not exclusively, for the water-power available along the foot of the New England hills led to the establishment of many factories there, which still remain and flourish under changed conditions, receiving their coal, however, largely by sea from Nova Scotia.

What has been the result of these conditions, and what do they promise?

First: An agricultural population in the Mississippi Basin already great, and capable of reaching dimensions from which imagination recoils, for though the number of persons to the square mile will be less than in Bengal or Egypt, where the peasants' standard of comfort is incomparably lower than that of the American farmer, it may be as dense as in the most prosperous agricultural districts of Europe.

Secondly: An industrial population now almost equalling the agricultural,[2] concentrated chiefly in the North-eastern States and along the skirts of the Alleghanies, and in large cities springing up here and there where (as at Chicago, Cleveland, Minneapolis, and St. Louis) commerce plants its centres of exchange and distribution. This industrial population grows far more swiftly than the agricultural, and the aggregate value of manufactured products increases faster from census to census than does that of the products of the soil.

Thirdly: A similar but very much smaller agricultural and industrial population along the Pacific, five-sixths of it within eighty miles of the coast.

Fourthly: Between the Mississippi Basin and this well-peopled Pacific shore a wide and very thinly inhabited tract, sometimes quite arid, and therefore a wilderness, sometimes showing grass-bearing hills with sheep or cattle, and a few

[1] There are other smaller coal districts, including one in Washington, on the shores of Puget Sound. Nor ought the immensely productive mineral oil districts, especially those of Pennsylvania and Ohio, to pass unnoticed.

[2] The population inhabiting cities of 8000 people and upwards was in 1890 still only 29·12 per cent of the total population (though in the North Atlantic division it reached 51 per cent). But a large part of those engaged in mining or manufactures may be found in places below that limit of population.

ranchmen upon the hill-slopes, more rarely valleys which irrigation has taught to wave with crops. And here and there through this tract, redeeming it from solitude, there will lie scattered mining towns, many of them quick to rise and almost as quick to vanish, but others destined, if they occupy the centre of a mining district, to maintain a permanent importance.

Thus the enormous preponderance of population will be on the eastern side of the continental watershed. It was so in 1890,—56,000,000 of people against 6,000,000,—it is likely to remain so, though the disparity may be somewhat less marked. The face of the nation will be turned eastward; and, to borrow a phrase of Lowell's, the front door of their house will open upon the Atlantic, the back door upon the Pacific. Faint and few, so far as we can now predict (though far greater than at this moment), will be the relations maintained with Eastern Asia and Australia across the vast expanse of that ocean compared with those that must exist with Europe, to which not only literature and social interests, but commerce also, will bind America by ties growing always closer and more numerous.

That the inhabitants of this territory will remain one nation is the conclusion to which, as already observed, the geography of the continent points. Considerations of an industrial and commercial kind enforce this forecast. The United States, with nearly all the vegetable staples of the temperate zone, and many that may be called subtropical, has within its borders a greater variety of products, mineral as well as vegetable, than any other country, and therefore a wider basis for internal interchange of commodities. Free Trade with other countries, desirable as it may be, is of less consequence where a vast home trade, stretching across a whole continent, has its freedom secured by the Constitution. The advantages of such freedom to the wheat and maize growers of the North-west, to the cotton and rice and sugar planters of the Gulf States, to the orange growers of Florida, and the vine growers of California, to the cattle men of the West and the horse breeders of Kentucky and Idaho, to the lumbermen of Maine and Washington, to the coal and iron men of Pennsylvania and the Alleghany States, to the factories of New England, both

employers and workmen, as well as to the consuming populations of the great cities, are so obvious as to constitute an immense security against separatist tendencies. Such advantages, coupled with the social and political forces discussed in other chapters, are now amply sufficient to hold the Pacific States to the Union, despite the obstacles which nature has interposed. In earlier stages of society these obstacles might well have proved insurmountable. Had communication been as difficult in the middle of the nineteenth century as it was in the sixteenth, the inhabitants of the Pacific coast might have formed a distinct nationality and grown into independent States; while in the inner recesses of the wide mountain land other and probably smaller communities would have sprung up, less advanced in culture, and each developing a type of its own.

But the age we live in favours aggregation. The assimilative power of language, institutions, and ideas, as well as of economic and industrial forces, is enormous, especially when this influence proceeds from so vast a body as that of the American people east of the Rocky Mountains, compared to which the dwellers on the western slope are still but few. The failure of the Mormon attempt to found a State is an instance to show how vain is the effort to escape from these influences; for even without an exertion of the military power of the United States, they must soon, by the natural process of colonization, have been absorbed into its mass. There is, accordingly, no such reason to expect detachment now as there might have been had neither railroads nor telegraphs existed, and California been accessible only round Cape Horn or across the Isthmus. Now five great trunk lines cross the continent; and though much of the territory which lies between the populous margin of the Pacific and the cities of Colorado, Nebraska, and Dakota is and must remain wild and barren, many settlements, mining, pastoral, and even agricultural, have begun to spring up in this intervening space, and the unpeopled gaps are narrowing day by day. Especially along the line of the more northerly railroads, population, though it must always be sparse, may become practically continuous. A close observer can, however, detect some differences in character between Californians and the Americans of the Eastern and Mississippi

States; and it is possible, though I think far from probable, that when immigration has ceased, and the Pacific coasts and valleys are peopled by the great-grandchildren of Californians and Oregonians, this difference may become more marked, and a Pacific variety of the American species be discernible.

We have so far been proceeding on the assumption that the inhabitants of the United States will be in the future what they have been during the last three generations. It must, however, be admitted that two agents are at work which may create differences between those who occupy different parts of the country greater than any which now exist. One of these is immigration from Europe, whereof I will only say that there is as yet little sign that it will substantially alter any section of the people, so strong is the assimilative power which the existing population exerts on the new-comers, and that it may probably, within the next few decades, begin to decline. Large as it has been, it has not yet affected the English spoken in any part of the country; and one may indeed note that though there are marked differences of pronunciation there are, as respects the words, few dialectic variations over the vast area of the Union. The other is climate. Now climatic influences seem to work but slowly on a national type already moulded and, so to speak, hammered into a definite shape by many centuries. The English race is, after all, a very recent arrival in America. Few, indeed, of the progenitors of the present dwellers in the South have been settled there for two centuries; that is to say, the present generation is at most only the sixth on which the climate has had time to tell. It is therefore quite possible that, when five or six more centuries have passed, the lowlanders of the Gulf States may, under the enervating heat and malarial fevers of their summers, together with the desistence from physical exertion which that heat compels, have become different from what they now are; though the comparative coolness and consequent reinvigorative powers of the winters, and the infiltration into their population of new-comers from the hardier North, will be influences working in the contrary direction. The moral and social sentiments predominant in a nation, and the atmosphere of ideas it breathes, tend, as education is more and more diffused, and the movements of travel to and fro

become constantly brisker, to be more and more powerful forces in producing similarity of character, and similarity of character tells on the man's whole life and constitution.

A like question has been raised regarding the whole people of the United States as compared with the European stocks whence they sprung. The climate of their new country is one of greater extremes of heat and cold, and its air more generally stimulative, than are the climate and air of the British Isles, or even of Germany and Scandinavia. That this climate should, given sufficient time, modify the physical type of a race, and therewith even its intellectual type, seems only natural. But the English race has not hitherto degenerated physically in its new home; in some districts it may even seem to have improved. The tables of life-insurance companies show that the average of life is as long as in Western Europe. People walk less and climb mountains less than they do in England, but quite as much physical strength and agility are put forth in games, and these are pursued with as much ardour. It was noted in the War of Secession that the percentage of recoveries from wounds was larger than in European wars, and the soldiers in both armies stood well the test of the long marches through rough and sometimes unhealthy regions to which they were exposed, those, perhaps, faring best who were of the purest American stock, *i.e.* who came from the districts least affected by recent immigration. It has, however, already been remarked that the time during which physical conditions have been able to work on the Anglo-American race is much too short to enable any but provisional conclusions to be formed; and for the same reason it is premature to speculate upon the changes in character and intellectual tastes which either the natural scenery of the American Continent, and in particular its vast central plain, or the occupations and economic environment of the people, with their increasing tendency to prefer urban to rural life, may in the course of ages produce. The science of ethnographic sociology is still only in its infancy, and the working of the causes it examines is so subtle that centuries of experience may be needed before it becomes possible to determine definite laws of national growth.

Let us sum up the points in which physical conditions seem

to have influenced the development of the American people, by trying to give a short answer to the question, What kind of a home has Nature given to the nation?

She has furnished it with resources for production, that is, with potential wealth, ampler and more varied than can be found in any other country,—an immense area of fertile soil, sunshine, and moisture fit for all the growths of the temperate, and even a few of the torrid zone, a store of minerals so large as to seem inexhaustible.

She has given it a climate in which the foremost races of mankind can thrive and (save in a few districts) labour, an air in most regions not only salubrious, but more stimulating than that of their ancient European seats.

She has made communication easy by huge natural water-courses, and by the general openness and smoothness of so much of the continent as lies east of the Rocky Mountains.

In laying out a vast central and almost unbroken plain, she has destined the largest and richest region of the country to be the home of one nation, and one only. That the lands which lie east of this region between the Alleghanies and the Atlantic, and those which lie west of it between the Rocky Mountains and the Pacific, are also occupied by that one nation is due to the fact that before the colonization of the central region had gone far, means of communication were invented which made the Alleghanies cease to be a barrier, and that before the Pacific coast had been thickly settled, the rest of the country was already so great in population, wealth, and power that its attraction was as irresistible as the moon finds the attraction of the earth to be.

Severing its home by a wide ocean from the old world of Europe on the east, and by a still wider one from the half old, half new, world of Asia and Australasia on the west, she has made the nation sovereign of its own fortunes. It need fear no attacks nor even any pressure from the military and naval powers of the eastern hemisphere, and it has little temptation to dissipate its strength in contests with them. It has no doubt a strong neighbour on the north, but a friendly one, linked by many ties of interest as well as kindred, and not likely ever to become threatening. It had on the south neighbours who might have been dangerous, but fortune favoured it

by making one of them hopelessly weak, and obliging the other, strong as she was, to quit possession at a critical moment. Thus is it left to itself as no great State has ever yet been in the world; thus its citizens enjoy an opportunity never before granted to a nation, of making their country what they will to have it.

These are unequalled advantages. They contain the elements of immense defensive strength, of immense material prosperity. They disclose an unrivalled field for the development of an industrial civilization. Nevertheless, students of history, knowing how unpredictable is the action of what we call moral causes, that is to say, of emotional and intellectual influences as contrasted with those rooted in physical and economic facts, will not venture to base upon the most careful survey of the physical conditions of America any bolder prophecy than this, that not only will the State be powerful and the wealth of its citizens prodigious, but that the nation will probably remain one in its government, and still more probably one in speech, in character, and in ideas.

CONSTITUTION OF THE UNITED STATES

WE, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SEC. 2. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

[Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.] [1] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[1] The clause included in brackets is amended by the XIVth Amendment, 2d section.

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SEC. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a president *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend farther than to removal from office, and disqualification to hold and enjoy any office of honour, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.

SEC. 4. The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SEC. 5. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SEC. 6. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

SEC. 7. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the

Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Sec. 8. The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads.

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations.

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

Sec. 9. The migration or importation of such persons as any of the

States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or *ex post facto* law shall be passed.

No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

SEC. 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II

SECTION 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows:

Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but

no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each ; which list they shall sign and certify, and transmit sealed to the seat of the Government of the United States directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed ; and if there be more than one who have such majority and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote ; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President; but if there should remain two or more who have equal votes, the Senate shall choose from them, by ballot, the Vice-President.][1]

The Congress may determine the time of choosing the electors, and the day on which they shall give their votes ; which day shall be the same throughout the United States.

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President ; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed, or a President shall be elected.

The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation :

[1] This clause in brackets has been superseded by the XIIth Amendment.

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

SEC. 2. The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SEC. 3. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SEC. 4. The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanours.

ARTICLE III

SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

SEC. 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States

shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States — between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

Sec. 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV

Section 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Sec. 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

No person held to service or labour in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.

Sec. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SEC. 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V

The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in Convention by the unanimous consent of the States present,[1]

[1] Rhode Island was not represented. Several of the delegates had left the Convention before it concluded its labours, and some others who remained refused to sign. In all, 65 delegates had been appointed, 55 attended, 39 signed.

The first ratification was that of Delaware, Dec. 7, 1787; the ninth (bringing the Constitution into force) that of New Hampshire, June 21, 1788; the last, that of Rhode Island, May 29, 1790.

the Seventeenth day of September, in the year of our Lord 1787, and of the Independence of the United States of America the Twelfth.

In Witness whereof we have hereunto subscribed our names.

Go. Washington,
Presidt. and Deputy from Virginia.

New Hampshire — John Langdon, Nicholas Gilman. *Massachusetts* — Nathaniel Gorham, Rufus King. *Connecticut* — Wm. Saml. Johnson, Roger Sherman. *New York* — Alexander Hamilton. *New Jersey* — Wil. Livingston, Wm. Paterson, David Brearley, Jona. Dayton. *Pennsylvania* — B. Franklin, Thos. Fitzsimons, Thomas Mifflin, Jared Ingersoll, Robt. Morris, James Wilson, Geo. Clymer, Gouv. Morris. *Delaware* — Geo. Read, Richard Bassett, Gunning Bedford, Jun., Jaco. Broom, John Dickinson. *Maryland* — James M'Henry, Dan. Carroll, Dan. Jenifer, of St. Thomas. *Virginia* — John Blair, James Madison, Jun. *North Carolina* — Wm. Blount, Hugh Williamson, Rich'd Dobbs Spaight. *South Carolina* — J. Rutledge, Charles Pinckney, Charles Cotesworth Pinckney, Pierce Butler. *Georgia* — William Few, Abr. Baldwin.

Attest: William Jackson, *Secretary*

Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

ARTICLE I[1]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE II

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in the time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be vio-

[1] Amendments I–X inclusive were proposed by Congress to the Legislatures of the States, Sept. 25, 1789, and ratified 1789–91.

lated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI[1]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII[2]

The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom at least shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; — The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

[1] Amendt. XI was proposed by Congress Sept. 5, 1794, and declared to have been ratified by the legislatures of three-fourths of the States, Jan. 8, 1798.

[2] Amendt. XII was proposed by Congress Dec. 12, 1803, and declared to have been ratified Sept. 25, 1804.

ARTICLE XIII[1]

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV[2]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SEC. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

SEC. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the

[1] Amendt. XIII was proposed by Congress Feb. 1, 1865, and declared to have been ratified by 27 of the 36 States, Dec. 18, 1865.

[2] Amendt. XIV was proposed by Congress June 16, 1866, and declared to have been ratified by 30 of the 36 States, July 28, 1868.

United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV[1]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, colour, or previous condition of servitude.

SEC. 2. The Congress shall have power to enforce this article by appropriate legislation.

[1] Amendt. XV was proposed by Congress Feb. 26, 1869, and declared to have been ratified by 29 of the 37 States, March 30, 1870.

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